85-1364

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

HERSHEL CLADY, et al.,

Petitioners,

vs.

COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "efficient and nonrandom" selection procedures endorsed by this Court in *County of Los Angeles v. Davis*, which had been used by the County to hire firefighters from 1973 to 1978, are a less discriminatory alternative giving rise to liability under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, where these procedures had a lesser disparate impact on minority applicants than those used in 1979 and 1980 and where the persons hired in the two periods performed equally on each of the County's own measures of job performance.

2. Whether the decision below is in direct conflict with this Court's decision in *Albemarle Paper Co. v. Moody* where it found the written test to be job related and hence a business necessity, even though the County's own empirical study shows no meaningful correlation between test scores and job performance for minorities, i.e., shows the test is *not* job related for minorities.

PARTIES TO THE PROCEEDINGS

The petitioners are Hershel Clady, Frederick Vega, Mario Mejia, Gregory Plain, Albert Rubalcaba, Michael Torres, Julius Janisse, Roger Mayfield, Serafin Espinoza and the certified plaintiff class of blacks and Hispanics who applied in 1979 for firefighter positions with the County of Los Angeles. The respondent is the County of Los Angeles.

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PETITION FOR WRIT OF CERTIORARI

The petitioners Hershel Clady, Frederick Vega, Mario Mejia, Gregory Plain, Albert Rubalcaba, Michael Torres, Julius Janisse, Roger Mayfield, Serafin Espinoza and the certified class they represent respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 10, 1985 and an order denying rehearing and rejecting the en banc

suggestion, and amending opinion entered November 13, 1985.

OPINIONS BELOW

The original opinion of the Ninth Circuit of Appeals is reported at 770 F.2d 1421 and appears as Appendix "A" hereto. The Order Denying Rehearing And Rejecting The En Banc Suggestion, And Amending Opinion has not been reported; the Order appears as Appendix "B" hereto. There has been no amended opinion reported which reflects the changes made by the Order. The Judgment and the Findings of Fact and Conclusions of Law of the District Court for the Central District of California, not officially reported, appear as Appendix "C" and Appendix "D," respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1985. A petition for rehearing with suggestion for rehearing en banc was denied by an order filed November 13, 1985 (Appendix "B"), and this petition is filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

STATEMENT OF THE CASE

This lawsuit is a class action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") to challenge the hiring practices instituted by the Los Angeles County ("County") in 1979 which had a severe disparate impact on black and Hispanic applicants for firefighter positions. Jurisdiction in the District Court was invoked under 42 U.S.C. § 2000e-5(f)(3) and 42 U.S.C. § 1331.

Question 1: Less Discriminatory Alternative

The hiring practices used by the County to select firefighters was previously before this Court in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). The instant lawsuit was filed because the County ignored this Court's admonitions in *County of Los Angeles v. Davis* and significantly altered the hiring procedures it had been using since 1972. The hiring procedures adopted by the County in 1979 on the heels of this Court's decision had a disasterous impact on the employment of minority firefighters.

When *County of Los Angeles v. Davis* was first filed, there was a stark historic pattern of discrimination as evidenced by the facts that of the 1,762 firefighters employed by the County, only 9 (0.5%) were black and only 50 (2.8%) were Hispanic in a community which was 10.8% black and 18.3% Hispanic. District Court Judge William P. Gray found that a major cause of this continuing pattern and practice of discrimination was the 1969 use of an unvalidated written test to rank candidates. Though the County had subsequently rejected ranking on the written text as a proper procedure, on an emergency basis it again in 1972 threatened to use the applicants' ranking on the

written test. *Davis v. County of Los Angeles*, 8 F.E.P. Cases 239, 240 (C.D. Cal. 1973), *aff'd in part, rev'd in part*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

Upon the filing of the *Davis* case, the County immediately altered its 1972 decision to select among candidates using their ranking on the written test. Then, over then next six years, it adopted a hiring process which had no adverse impact on black or Hispanic applicants. This Court described in detail the selection procedures used during these years, 440 U.S. at 628-29, and specifically recognized that the County had "replaced the 1969 procedure with a new method of screening job applicants," i.e., "[t]he test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates," 440 U.S. at 628. This Court then endorsed these new procedures as "an efficient and nonrandom method of screening job applicants and increasing minority representation in the Fire Department" and found that there was no reason to believe that the County "would replace the present procedures with procedures that they regarded as unsatisfactory even before the commencement of this litigation." 440 U.S. at 632. Based on these very findings, the *Davis* case was determined to be moot.

The County responded as if this Court's ruling were a total vindication of its previous employment practices and in 1979 reinstituted the 1969 procedure of using an unvalidated written test to rank job applicants, a practice which it claimed it had abandoned. *See* 440 U.S. 631-32. Predictably, this reversion to its prior procedures again had a devastating impact on the employment opportunities of black and Hispanic applicants.

This bold decision not only constituted a serious affront to this Court's ruling in *County of Los Angeles v. Davis* but also resulted in a violation of the little understood alternative device prong of the disparate impact theory of discrimination. The uncontested facts below from the County's own empirical studies established that the firefighters hired from 1973 to 1978, using the procedures endorsed by this Court in *County of Los Angeles v. Davis*, performed equally to those then hired in 1979 and 1980 on all four of the County's own established measures of job performance: written tests in the academy ("academy score"), job similations in the academy ("deficiency points"), graduation from the academy ("graduation rates"), and a written test given six months after academy graduation ("station score").[1] However, the 1979 procedures caused the selection rate for minorities to plummet to a mere 18%, a figure far below the 34% minority representation among applicants.

The Court of Appeals simply ignored these most relevant, uncontested facts. (*See* Appendix, pp. A-22 and A-23.) Plaintiffs submitted a petition for reconsideration alerting the Court of Appeal to its oversight and, though

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[1] The following comparative figures are found in the County's own exhibits (Exhibit 200, p.76 and Exhibit 201, p.33):

	1973-1978	1979-1980
Academy Score	91.1	91.7
Deficiency Points	83.1	82.1
Graduation Rates	89.8%	88.7%
Station Score	93.2	91.2

The Assistant Fire Chief who headed the training academy testified that these small differences did not constitute a "real" or practical difference in performance. (RT 542-546.)

altering its opinion to respond to other issues raised by the petition, the Court of Appeals remained steadfast in refusing even to acknowledge these uncontested facts. (*See* Appendix, pp. B-1 to B-3.)

Question 2: Test Not Job Related For Minorities

The empirical study performed by the County to determine whether its written test is job related included a large number of the blacks (83) and Hispanics (82) hired between 1973 and 1978. These minorities made it feasible for the County to assess the job-relatedness of the written test separately for each racial group, as required by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 435 (1975). The findings indicate that the test was *not* job related for blacks or Hispanics. None of the straight correlations between test scores and job performance for blacks or Hispanics had correlation coefficients above .30, which is the threshold recognized by the Ninth Circuit in this case for a correlation to be reliable. (Appendix, p. A-21; Exhibit 200, p. 90.) Also, none of these correlations were statistically significant. (Exhibit 200, p. 90.)[2] The County's

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[2] The County's study also "corrected" these correlations for restriction in range which enhanced their findings but, even then, only the single correlation for Hispanics between test scores and station scores (.3360) both exceeded a .30 correlation and was found to be statistically significant. The Standards for Educational and Psychological Tests (American Psychological Association, Washington, D.C., 1974), however, provide at Standard E8.2.1 that: "Where correlation coefficients are corrected for attenuation or restricted range, full information relevant to the correction should be presented. If such corrections are made; *significance tests should be made with uncorrected correlation coefficients.* Essential." (Emphasis added.)

own study, therefore, indicates that the written test is not proper for use in evaluating minority applicants.

The Court of Appeals ignored petitioners' reliance on *Albemarle* and ignored the empirical evidence in the record. Instead, it ruled, contrary to *Albemarle*, that there is no obligation, even where feasible, to determine the job-relatedness of a test separately for minorities. (Appendix, p. A-20.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ILLUSTRATES THE NEED TO DEFINE THE PROOF REQUIRED FOR A TITLE VII PLAINTIFF TO ESTABLISH THE EXISTENCE OF A LESS DISCRIMINATORY ALTERNATIVE

This petition presents the Supreme Court with an opportunity to interpret and hence to give meaning to the Title VII plaintiff's burden to show the existence of a less discriminatory alternative selection procedure which equally meets the employer's hiring needs. This third and final burden of proof under the Title VII disparate impact theory of discrimination is well established in theory by this Court's opinions in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Dothard v. Rawlinson*, 433 U.S. 321 (1977). However, this Court has never addressed a case where the plaintiff sought to meet this burden, and hence the lower courts have received no guidance on the kinds of facts relevant to the alternative device determination. The instant case is an ideal vehicle for the Court because it involves a well developed set of uncontested facts directly relevant to the issue.

The need for a Supreme Court ruling on this issue is evident from the observation in B. Schlei & P. Grossman, *Employment Discrimination Law* 156 (2d ed. 1983) that no plaintiff has met the burden to show a less discriminatory but equally job related alternative to a scored test. It is submitted that, unless the less discriminatory alternative aspect of Title VII is to remain forever a nullity, this Court must indicate that there are, in fact, situations in which this burden is met. The instant case presents just such a factual setting.

The less discriminatory, equally job related alternative put forth by plaintiffs in the instant case was the very selection process endorsed by this Court in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). This Court found that the County had instituted "an efficient and nonrandom method of screening job applicants and increasing minority representation in the Fire Department" and that there was no reason to believe that the County "would replace their present procedures with procedures that they regarded as unsatisfactory even before the commencement of this litigation." 440 U.S. at 632. These very findings were critical to this Court's determination that there was no longer a need for the District Court to continue to monitor the County's hiring of firefighters, thereby rendering the lawsuit moot.

The "procedures that they [the County] regarded as unsatisfactory" also were described by this Court. It was recognized that in 1969 the County had used its written test as a ranking device but in 1971 it "replaced the 1969 procedure with a new method of screening job applicants," i.e., "[t]he test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates." 440 U.S. at 628. These two alternative methods of using the

written test lie at the core of the plaintiffs' alternative device showing because in 1979 the County acted with total distain of this Court's ruling and did alter its procedures and, in fact, reverted to the 1969 procedure of ranking candidates based on their scores on the written test.

The results of the County's abandonment of the procedures endorsed by this Court were dramatic. From 1973 to 1978 the County's selection procedures had had no disparate impact on minorities. However, after altering its procedures, the hiring of minority firefighters plummeted to a mere 18%, despite a 34% minority representation among applicants.

The procedures endorsed by this Court, furthermore, were shown by uncontested facts in the County's own empirical studies to be equally related to job performance. The County's studies identified four specific measures of job performance. Based on the data reported in these studies, plaintiffs were able to show that the persons hired using the alternative, non-discriminatory procedures utilized from 1973 to 1978 performed virtually identically on all four measures of job performance as the persons hired in 1979 and 1980 using highly discriminatory procedures: academy score (91.1 vs. 91.7); deficiency points (83.1 vs. 82.1); graduation rate (89.8 vs. 88.7); and station score (93.2 vs. 91.2). *See* footnote 1, *supra*.

The Court of Appeals simply ignored these facts, without any explanation. (Appendix, pp. A-22 and A-23.) It is submitted that not only are these facts directly relevant to the alternative device issue, but also they are precisely the kind of facts necessary for plaintiffs to meet their burden to show there is an equally job related alternative selection procedure.

The Court of Appeals did reference certain findings in addressing the alternative selection device issue but the findings relied upon by the Court had *no* evidentiary support in the record. *Cf. Thompson v. Louisville*, 362 U.S. 199, 206 (1960). The Court of Appeals discussion is in error as follows:

(a) The Court of Appeals concluded that the applicant population in 1973 to 1978 was of a higher quality relying on the facts that 71% of those hired were veterans as compared to 43% of those hired in 1979 and 1980 and that veterans are well suited to the discipline of fire departments. These percentages, however, do not relate to the applicant population, but only to the persons actually hired. Moreover, the record contains no factual support for the contention that veterans make better firefighters; indeed, the uncontested facts are that the recruits who were 71% veterans (1973-1978) performed the same on all four measures of job performance as the recruits who were only 43% veterans (1979-1980) and that veterans were in fact disproportionately among those terminated from the training academy (Exhibit 201, p.23).

(b) The Court of Appeals also implies that the applicant population was of a lower quality in 1979 because there had been special minority recruitment efforts. Again, there is no evidence to support this conclusion. Indeed, the only evidence on this point was an admission by the County's own official in charge of the 1979 minority recruitment that there was no reason to believe that the minorities recruited lowered the quality of the applicant pool. (RT 305-306.)

(c) There also is no factual support for the Court of Appeals assertion that the 1979 procedures resulted in a cost savings. The County asserted a cost savings from an expected higher success rate in the training academy

(Appendix, pp. A-8, D-16), but the County's actual experience was that the graduation rates at the academy were, if anything, slightly higher for the persons hired from 1973 to 1978.[3]

It is submitted that the Court of Appeals errored because it failed to conduct a probing review of the findings signed by the District Court. The entire wording of these findings was the product of counsel for the County, not the District Court. Indeed, 171 of the 178 subparts in the findings were adopted word-for-word and only conclusionary and disparaging statements were deleted from the other seven subparts. The District Court had given neither oral nor written guidance for the drafting of these findings. Furthermore, the findings were not signed at a time when the trial record was fresh in the District Court's mind; rather, more than six months had elapsed since trial before the findings were signed and entered. Hence, unlike the situation presented by *Anderson v. City of Bessemer*, ___ U.S. ___, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 528 (1985), there is reason to doubt that the findings "represent the judge's own considered conclusions."

Because this case presents a well developed set of *uncontested* facts on the less discriminatory alternative issue, it provides this Court with a proper and perhaps unique vehicle with which to clarify the nature of a

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[3] The Court of Appeals also wrongly inferred that the plaintiffs relied solely on testimony by the County Fire Chief that persons hired using the 1973-1978 procedure were equally competent as those hired in 1979-1980. It is submitted that while such an admission by an adverse witness is entitled to great weight, it was not the sole evidence relied upon but rather it merely corroborated the facts that the firefighters hired during the two periods performed equally well on the County's four measures of job performance.

plaintiff's burden to prove the existence of a less discriminatory alternative procedure which equally meets an employer's legitimate hiring needs. The Court of Appeals implicit rejection of highly relevant, empirical facts is a travesty of justice which should not be countenanced and should not be allowed to happen in other cases. Indeed, if a full hearing is not granted, petitioners submit that the evidence is so directly on point and the error of ignoring the evidence is so egregious that the Court should consider a summary reversal.

2. THE DECISION BELOW THAT THE JOB-RELATEDNESS OF A TEST FOR MINORITIES IS NOT RELEVANT IS CONTRARY TO THIS COURT'S DECISION IN *ALBEMARLE* AND TO DECISIONS IN OTHER CIRCUITS

The Ninth Circuit rejected this Court's ruling in *Albemarle Paper Co. v. Moody, supra* that a written test which is not job related for black and Hispanic applicants cannot be considered justified as a business necessity. Here, the County's own empirical study found that for both blacks and Hispanics, there was no relationship between test scores and later job performance and hence that the test was *not job related* for both blacks and Hispanics. Nonetheless, the Court of Appeal, without even addressing these uncontested facts, held the test to be job related and hence not to have violated Title VII.

The Ninth Circuit's ruling is in direct conflict with both Supreme Court precedent and decisions of the Fifth, Seventh and Eighth Circuits. In *Albemarle Paper Co. v. Moody*, 422 U.S. at 435-436, this Court held that an employer had failed to meet its burden to prove a written

test to be job related due, in part, to its failure to assess the job-relatedness of the test for blacks, stating:

> The EEOC Guidelines likewise provide that "[d]ata must be generated and results separately reported for minority and nonminority groups wherever technically feasible." 29 CFR § 1607.5(b)(5). In the present case, such "differential validation" as to racial groups was very likely not "feasible," because years of discrimination at the plant have insured that nearly all of the upper level employees are white. But there has been no clear showing that differential validation was not feasible for lower level jobs. More importantly, the Guidelines provide:
>
> "If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible." 29 CFR § 1607.5(b)(1).
>
> ". . . [E]vidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question." 29 CFR § 1607.5(b)(5).

For all these reasons, we agree with the Court of Appeals that the District Court erred in concluding that Albemarle had proved the job relatedness of its testing program and that the

> respondents were consequently not entitled to equitable relief.

In two opinions which pre-date the *Albemarle* decision, the Fifth and Eighth Circuits had similarly required, where feasible, a separate reporting of results for minorities. In *United States v. Georgia Power Co.*, 474 F.2d 906, 913-15 (5th Cir. 1973), the Fifth Circuit held that the employer had not met its burden to prove that validation of a written test separately for blacks was not feasible. The Fifth Circuit, quoting from its earlier decision in *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 456 (5th Cir. 1971), ruled that:

> ". . . Griggs demands more substantial proof, most often positive empirical evidence, of the relationship between test scores and job performance [by blacks]." (Brackets in original.) (474 F.2d at 914.)

Similarly, the Eighth Circuit in *Rogers v. International Paper Co.*, 510 F.2d 1340, 1350 (8th Cir.), *vacated on other grounds*, 432 U.S. 809, *reaff'd*, 526 F.2d 722 (8th Cir. 1975) held a study to be inadequate in part due to the employer's failure, where feasible, to include blacks in the study's sample and to validate the test separately for blacks.

Finally, the Seventh Circuit relied on *Albemarle* in *United States v. City of Chicago*, 549 F.2d 415, 433 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) in holding a test to violate Title VII under facts identical to the instant case. The Seventh Circuit considered relevant the fact that "the results of the study did not show any correlations for blacks at levels of practical significance." (*Id.*) The Court then ruled as follows:

> As we have already noted, the EEOC Guidelines require that an examination be validated for both

> minorities and whites. 29 C.F.R. § 1607.5(b)(5). We do not consider this requirement a mere technicality. See *Albemarle*, 422 U.S. at 435, 95 S.Ct. 2362. Where a test excludes minorities from promotion at disproportionate rates, those who use the test must show that its use enhances their ability to predict job performance for minorities as well as whites and thus legitimately excludes minorities because of deficiencies in their qualifications for the job. (*Id.*)

In stark contrast, the Ninth Circuit circumvents this line of cases by two waves of its hands. First, it incorrectly relegates the requirement that the test must be job related for minorities as nothing more than a theory proposed by plaintiffs' expert witness and then discounts the "proposition" based on a generalized finding, drafted by the County, which summarily rejects all of the expert's testimony. (Appendix, pp. A-20, D-23.) Second, the Ninth Circuit concludes that "differential validation lacks support in the technical community" based on a reference to B. Schlei & P. Grossman, *Employment Discrimination Law* 154, n. 151 (2d ed. 1983), which in turn cites a single professional journal article. (Appendix, p. A-20.) These general, conclusionary statements, however, do not negate the actual findings in the County's empirical study that, in fact, the test does not correlate with job performance for blacks or for Hispanics.

The resultant irony is that the written test was upheld as job related because of a correlation for white applicants when the empirical evidence shows that it was *not job related* for the very persons for whose protection Title VII requires the study to be performed - the black and Hispanic applicants. Again, the Supreme Court precedent and the

facts are so clear that even a summary reversal with an instruction on remand for the Ninth Circuit to reconsider its ruling in light of *Albemarle Paper Co. v. Moody, supra,* is warranted.

CONCLUSION

For these reasons, petitioners submit that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5900
DC# CV 79-3843-MML
Central California

HERSHEL CLADY, et al.,
Plaintiffs-Appellants,
vs.

COUNTY OF LOS ANGELES,
Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Central District of California
District Judge Malcolm M. Lucas, Presiding

[Argued and Submitted May 6, 1985 -
Pasadena]

Filed September 10, 1985

Before: WRIGHT, ALARCON and NORRIS, Circuit Judges. WRIGHT, Circuit Judge:

This class action for damages and injunctive relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (Title VII), and 42 U.S.C. § 1981 challenges the 1979 selection procedures used by the Los Angeles County Fire Department. Plaintiffs allege that the written examination, education requirement (ER), and physical agility test (PAT) had an adverse impact on black

and Hispanic applicants. Following a seven day bench trial, the district court entered judgment for the County of Los Angeles (County). We affirm the judgment.

FACTS AND PROCEEDINGS BELOW

To understand the parties' positions, we provide in some detail the history of prior legal challenges to the County's firefighter selection procedures.

1969 Exam

In 1969, firefighter applicants were required to take a civil service examination and a physical agility test. They were ranked according to their performance on both tests. Following successful job interviews, candidates were placed on a hiring eligibility list. The County voluntarily discontinued these procedures after it was determined that they had a disparate adverse impact on minority hiring. *See County of Los Angeles v. Davis*, 440 U.S. 625, 627-28 (1979) (describing 1969 selection procedures).

1972-73 Exam

Hiring procedures were changed in 1971 but court challenges prevented their implementation. The County proposed to eliminate ranking candidates by written exam score. A new written exam was designed to eliminate cultural bias. It was to be graded on a pass/fail basis.

Five hundred applicants who passed the written exam were to be selected at random for oral interviews and physical agility tests. The candidates then would be ranked for appointment to available openings.

In January 1972, the County conducted a written examination pursuant to this plan. Ninety-seven percent of the applicants passed. Before further selection was made, a lawsuit was filed charging that the random selection

procedure violated civil service regulations and the county charter. The County was enjoined from further selection of firefighters.

When staffing needs became critical, the County proposed to interview the top 544 applicants based on written exam scores. Of this number, 492 were white, 10 black, and 33 Mexican-American. Minority applicants objected and this plan, too, was abandoned.

In 1973, unsuccessful black and Mexican-American firefighter applicants brought a Title VII class action against the County, its Board of Supervisors, and its Civil Service Commission challenging selection procedures used in 1969 and 1972-73. District Judge William P. Gray held for the plaintiffs, enjoining future discrimination and mandating good faith affirmative action efforts. *Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 239 (C.D. Cal. 1973), *aff'd in part, rev'd in part*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

Judge Gray found that while minorities comprised 29.1% of L.A. County, they comprised 3.3% of the firefighters. *Id.* at 240. Moreover, the County failed to validate the 1972 exam as predictive of job performance. *Id.* at 240-41. The court entered a remedial hiring order requiring that at least 20% of all new recruits be black and 20% be Mexican-American until their percentages equalled the corresponding percentages for those minorities in Los Angeles County. *Id.* at 242.

Between 1973 and 1979 when Judge Gray's order was in effect, all applicants who had passed the 1972 written exam were interviewed. An eligibility list was formulated using the oral interview as a ranking device. The civil service rule then in effect, the "rule of three," required the County to consider only the top three candidates on the eligible list for

the next firefighter opening. Pursuant to the court order, the County permitted the first of the top three blacks and the first of the top three Mexican-American candidates to be certified as eligible for any given opening. These procedures yielded a 55% minority hiring level during this period.

Judge Gray's injunction was dissolved by the Supreme Court in March 1979. Specifically, the Court held that any discrimination from the 1972 selection procedures had been vitiated by the more than five years of hiring under Judge Gray's order. *Davis*, 440 U.S. at 633.

1979-80 Exam

When Judge Gray's order was vacated, the County developed the selection procedures at issue here. The process began by posting bulletins which announced filing dates, minimum job qualifications and examination procedures.

Persons who had filed, "notice of interest" cards with the county since the last application period also were notified of openings. In addition to the recruitment efforts by County personnel, defendant contracted with an outside organization, the International Association of Firefighters, to recruit and prepare minority candidates.

Applicants had to be at least 18 years of age, but not older than 20. They had to have a high school diploma or general equivalency degree (GED). A written test was administered to all applicants who appeared on the scheduled testing date and who met these minimum requirements.

The 1979 written exam measured mechanical comprehension, spatial perception, and verbal ability. Applicants who scored less than 53 correct out of 95 multiple-choice questions were excluded from further consideration.

Next in the examination was the administration of an oral interview to all applicants qualifying on the examination. At that time, a panel of three persons assessed the applicant's education, experience and personal suitability for performing firefighter duties.

An "eligible list" was then created which ranked the applicants who qualified on both the written test and oral interview. The relative ranking was determined by weighting the written exam score by 25% and the oral interview by 75%. A ten point credit was added for qualifying military veterans.

As openings arose, the candidates were administered a physical agility test on a pass/fail basis. It consisted of six parts,[1] all of which had to be passed. Selection of candidates from the eligible list was made in accordance with the "rule of three" civil service requirement.

In April 1981, the "rule of three" was replaced with a new civil service rule which authorized a "banding" system for selecting candidates from an eligible list. Banding permitted discretion to select for hire any candidate whose final score was within a band of scores.[2] Appointments were made from the highest ranking band until fewer than five persons were available for appointment from that band. Following appointment from the eligible list, all newly hired firefighters were required to complete a training program at the Fire Academy and a one year probation period.

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[1] The PAT was composed of six parts: 1) a hose line extension task, 2) hydrant manipulation, 3) ladder climb, 4) hose loading, 5) hose tower rope pull, and 6) a hose and ladder storing exercise.

[2] The hiring bands, in order, were these: (1) 100 plus (called the veteran's band because only those with the 10 point veteran credit can score over 100); (b) 95-100; (c) 89-94; (d) 83-88; (e) 77-82; and (f) 70-76.

Present Lawsuit

In October 1979, plaintiffs filed this lawsuit alleging a pattern of illegal discrimination by the County based on race, color and national origin. Pretrial orders limited this action to the 1979 firefighter selection procedures.

In May 1980, the court conditionally certified a plaintiff class of:

> (1) All black and Mexican-American applicants for the position of firefighter with the Los Angeles county Fire Department whose applications were processed under the 1979 selection procedures and who were not hired by defendant; and
>
> (2) All black and Mexican-American applicants for the position of firefighter with the Los Angeles County Fire Department who will apply in the future.

Plaintiff's motion for preliminary injunction was granted in April 1981, ordering defendant to select 35% blacks and Hispanics[3] for any future classes.

Seven recruit classes, totalling 280 persons, were hired pursuant to the 1979 selection procedures. The parties stipulated that the selection rate for blacks and Hispanics was 18% for the first four classes. This rate jumped to 40% for the last three classes hired pursuant to Judge Lucas' preliminary injunction and the civil service banding rule.

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[3] We note that Mexican-Americans are a class within the larger Hispanic population. The complaint was filed on behalf of black and Mexican-American applicants, and the plaintiff class was certified on this basis. As a case proceeded to trial, however, the focus of impact analysis shifted from Mexican-Americans to Hispanics.

The County conducted extensive validation studies covering the period from the imposition of Judge Gray's order until commencement of this action. The three studies were:

(1) Firefighter Validation Study: Los Angeles County, dated February 1980 (Study);

(2) 1979 Firefighter Validation Study Supplement: Los Angeles County, dated June 1980 (Supplement); and

(3) Analysis of the Job Relatedness of Academy and Recruit Follow-Up Examinations at the Los Angeles County Fire Department, dated June 8, 1981 (Academy Study).

The Study compared test scores from the written exam received by the first three recruit classes with their performance on four criteria: (1) academy scores, (2) station scores, (3) deficiency points, and (4) academy graduation.[4]

Through its validation studies, the County sought to demonstrate a significant correlation between the exam components and important elements of firefighter training. Correlation coefficients[5] derived for the 1979 written test

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[4] Academy score was based on four written tests given early in the training program at the academy. Station score represented the score received on a written exam taken six months after becoming a firefighter. Deficiency points were given by training captains at the academy for observed mistakes or omissions in exercises. Academy graduation signified whether or not a candidate was graduated or terminated.

[5] Criterion-related validation is established when there is a significant positive correlation between comparative success on a test and comparative success on some measure of job performance. B. Schlei & P. Grossman, *Employment Discrimination Law*, 114 (2d ed. 1983). The

were:

.7162 for deficiency points
.6435 for Academy score
.3838 for graduation/termination

Sample size was insufficient to obtain a significant correlation for station score. The County's personnel analyst who had primary responsibility for conducting the studies testified that the negative number on deficiency points meant that those who had more points had lower test scores.

Other witnesses for the County testified that all three studies met professionally accepted standards. Plaintiffs did not contest the appropriateness of the performance criteria against which the exam was correlated.

The Supplement included a utility analysis which estimated that use of the written exam would result in an increase in the selection of qualified recruits from 9% to 48%. Based on this estimate, the County determined that it could save between $39,000 and $180,000 in direct training costs per class.[6]

The Academy Study concluded that the Academy training tests and the recruit follow-up exams "were representative of important or critical work behaviors performed by Firefighters." Academy Study, Defendant's Exhibit 202, at 14.

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degree of this relationship is expressed as a "correlation coefficient," which ranges from -1.0 (completely negative relationship: the better one does on the test, the worse one perform on the job) to 1.0 (total identity of relative test scores and relative job performance).

[6] In September 1982, the direct cost of training a recruit at the Academy was $9,515.35.

Trial

Plaintiffs' case in chief was brief. There was no direct evidence of discriminatory treatment of blacks or Hispanics. The entire case was founded on stipulated personnel department data. Plaintiffs relied on Dr. James J. Kirkpatrick, an industrial psychologist and experienced expert witness, to interpret the stipulated facts. They also called the County's chief personnel analyst, Frank V. Frazier, and Fire Chief Clyde A. Bragdon as adverse witnesses.

Defendant called 13 expert and lay witnesses, mostly Fire Department personnel, to prove job-relatedness of the selection devices and absence of legally sufficient alternative selection procedures.

The court concluded that plaintiffs failed to establish a *prima facie* case of disparate impact for the overall 1979 selection procedures. The court further concluded that plaintiffs failed to establish disparate impact against blacks and Hispanics for the ER and PAT. Nor did plaintiffs prove disparate impact against Hispanics for the written exam.

The only issue on which plaintiffs established a *prima facie* case was disparate impact against blacks on the written exam as a discrete selection device. However, the court found that the County carried its burden of proving the exam's job-relatedness. Plaintiffs failed to identify alternative selection devices that would serve the County's hiring needs with less adverse impact. Finally, the court concluded plaintiffs lacked standing to challenge any subsequent firefighter exam.

STANDARD OF REVIEW

Appellants assert that the findings below are not to be accorded the same weight as findings written by the court. They allege that Judge Lucas incorporated 171 of 178 subparts from the County's proposed findings. Only certain proposed credibility determinations were rejected.

A recent Supreme Court decision, *Anderson v. City of Bessemer*, 105 S. Ct. 1504, 1511 (1985), makes clear that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." The court's findings vary only minimally from defendant's proposed findings. However, we see "no reason to subject those findings to a more stringent appellate review than is called for by the appellate rules." *Id.*

We review the district court's findings of fact under the clearly erroneous standard of review. *Id.* at 1511-13; Fed. R. Civ. P. 52(a). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 1512.

It is uncertain what standard of review applies to plaintiffs' establishment of a *prima facie* case. *Compare Peters v. Lieuallen*, 746 F.2d 1390, 1392 (9th Cir. 1984) (clearly erroneous) with *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480-81 (9th Cir. 1983) (*de novo*). We believe *de novo* review is compelled because "the question requires us to consider legal concepts in the mix of fact and law." *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984).

ANALYSIS

Title VII "Proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). It does not mandate special treatment in hiring merely because a person "was formerly the subject of discrimination, or because he is a member of a minority group." *Id.* Indeed, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.*

To succeed under disparate impact theory, appellants must establish that a facially neutral employment practice produces a significant adverse impact on a protected class. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). Appellants can meet this burden through reliable statistics. *See Spaulding v. University of Washington*, 740 F.2d 686, 703 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

Intent to discriminate need not be shown. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). If a plaintiff fails to meet the initial burden of establishing a *prima facie* case of substantial adverse impact, validity of the selection device is irrelevant. *Moore v. Southwestern Bell Telephone Co.*, 593 F.2d 607, 608 (5th Cir. 1979) (per curiam).

If substantial impact is demonstrated by a preponderance of the evidence, the burden shifts to the employer to validate the selection device, that is, to show that it has "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. When scored tests are involved, this circuit has required a showing that the test actually measure "skills, knowledge or ability" required for

successful performance on the job. *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1283 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). *Contra Rivera v. City of Wichita Falls*, 665 F.2d 531, 538 n.9 (5th Cir. 1982) (test is legally sufficient if it validly predicts performance at the training academy).

If the employer fails to meet its burden, use of the selection device will be deemed a Title VII violation. If it succeeds, the plaintiff then may attempt to rebut the defendant's evidence by showing that although job-related, the test does not constitute a business necessity because an alternative selection device exists which would have comparable business utility and less adverse impact. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

I. Impact Analysis

Appellants urge rigid adherence to the so-called "80% rule" found in the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), 29 C.F.R. Part 1607 (1984). The Uniform Guidelines apply to any selection procedure "used as a basis for making employment decisions." *Id.* § 1607.2(C).

For determining adverse impact, the Uniform Guidelines set 80 percent as a "rule of thumb." Thus, a scored test or other selection device normally is considered to have adverse impact if it has a "selection rate for any race, sex, or ethnic group which is less than four-fifth (4/5) (or eighty percent) of the rate of the group with the highest rate. . . ." *Id.*, § 1607.4(D). The rule does not require strict adherence.

> Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms

> or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

Id.

The Uniform Guidelines are not legally binding. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 142-42 (1976). They have not been promulgated as regulations and no not have the force of law. *Aguilera v. Cook County Police and Corrections Merit Board*, 760 F.2d 844, 847 (7th Cir. 1985). Additionally, the 80 percent rule has been sharply criticized by courts and commentators. *See* E. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793, 805 (1978) (ill-conceived rule capable of producing anomalous results because it fails to take account of differences in sampling size).

There is no consensus on a threshold mathematical showing of variance to constitute substantial disproportionate impact. Some courts have looked to *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977), which found adverse impact where the selection rate for the protected group was "greater than two or three standard deviations" from the selection rate of their counterparts. *See, e.g., Rivera*, 665 F.2d at 536-37 n.7; *Guardians Association of the New York City Police Dept. v. Civil Service Commission*,

630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

Others have applied the 80 percent rule of the Uniform Guidelines. *See, e.g., Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350, 356-57 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) (finding adverse impact where black selection rate was between 42.5% and 44.4% of whites). Without endorsing either method, this circuit analyzes whether the statistical disparity is "substantial" or "significant" in a given case. *Contreras*, 656 F.2d at 1274-75 (passing ratio of 2.45:1 established adverse impact); *Craig v. County of Los Angeles*, 626 F.2d 659, 661-62 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) (failure ratio of 2.5:1 held to establish adverse impact).[7]

The plaintiffs concede that there is no "bottom line" adverse impact on blacks and Hispanics when evaluating the total selection process. Significantly, the district court found that there was "[n]o statistically significant difference between hires of Blacks and Hispanics and their representation in the Civilian Labor Force. . . ." Finding No. 14(a)(1).

However, in *Connecticut v. Teal*, the Supreme Court held that discrete pass/fail barriers having adverse impact must be individually validated even if there is no "bottom line" disparate impact for the entire multicomponent selection process.[8] 457 U.S. at 442, 452. Here, the written exam,

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[7] Method of comparison affects whether adverse impact appears "substantial." Most courts compare selection rates; some compare failure rates. As noted above, this circuit has used both.

[8] Significantly, the Uniform Guidelines take the opposite view. They provide that if the total selection process for a job does not have adverse

education requirement (ER), and physical agility test (PAT) are pass/fail barriers under *Teal*. Accordingly, we must evaluate each device separately for adverse impact. If plaintiffs establish a *prima facie* case as to any discrete selection device, we must consider whether defendant met its burden of proving job-relatedness.

A. Written Exam

Considering the written exam as a discrete selection device, the district court found no actionable adverse impact for Hispanics while finding actionable impact for blacks. The parties disagree over the proper method to compute the exam's impact. Plaintiffs use failure rates and figures based on self-identification by racial codes. The district court adopted defendant's use of pass rates and figures based on visual survey and surname review by the test monitors. The tests were coded using the County's method, which is the only method of comparing tests over time. The figures are as follows:

	Whites	Blacks	Hispanics
Took Written Test	1816	436	525
Passed Written Test	1375	148	292
Passing Rate	75.7%	33.9%	55.6%

Appellants failed to prove that the court's method of comparison was clearly erroneous.

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impact, individual components having impact need not "in usual circumstances" be validated. 29 C.F.R. § 1607.4(C).

(1) **Hispanics**

Using the 80 percent rule, the court found that the difference between the passing rate achieved by Hispanics and 80 percent of the passing rate for whites was only 5 percent. Computing five percent of 525 Hispanic examinees, the court found the "relative small number differences . . . [to be] unreliable as evidence of actionable adverse impact." Finding No. 15(f).

Appellants assert that the numerical differences here are large and statistically significant. They compare the exam pass rates here with those found to be actionable adverse impact in *Craig*, 626 F.2d at 661 n.3. In that case, the pass rate for Mexican-Americans taking a test to select Deputy Sheriffs was 55 percent (compared to 55.6 percent here), while the white passing rate was 77 percent (compared to 75.7 percent here). *Id.* We find the appellants' arguments persuasive. The court erred in finding no actionable adverse impact against Hispanics considering the written exam as a pass/fail device.

Appellants also attack use of the written exam as a ranking device. However, they fail to prove that the district court's finding 15(i)[9] is clearly erroneous. A generalized attack on the ranking procedure falls short of the level of evidence required to reverse the court's finding.

(2) **Blacks**

Appellee does not dispute the finding of actionable impact against blacks taking the written exam. The battleground of this appeal concerns validation and less discriminatory alternatives, discussed later.

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[9] "No evidence was adduced sufficient to establish the additional adverse impact of the written test as a weighted rather than pass/fail selection device."

B. Education Requirement (ER)

The district court found that

> Plaintiffs have failed to show that the education requirement has an adverse impact on Blacks and Hispanics, whether in terms of actual applicants who were disqualified by the educational requirement or potential applicants who otherwise would have applied for the 1979 Firefighter Examination but for the educational requirement.

Finding No. 20.

To refute the court's detailed findings concerning the ER, appellants rely on generalized census figures reflecting percentages of California with high school degrees. These statistics are not differentiated by age and, therefore, cannot be used to establish disparate impact for the ER. *See Moore*, 708 F.2d at 482-83 (proxy pool must be that of the local labor force possessing the requisite skills); *Pack v. Energy Research and Development Administration*, 566 F.2d 1111, 1113 (9th Cir. 1977) (per curiam) (labor pool must possess requisite skills).

Moreover, plaintiffs' expert, Dr. Kirkpatrick, testified at trial that the census figures included illegal aliens, who could not be employed as firefighters.

C. Physical Agility Test (PAT)

The district court found that plaintiffs failed to show that the 1979 PAT had any adverse impact on Hispanics, the only group challenging it. Finding No. 23. The court further found that the statistical analysis performed by plaintiffs' expert was unreliable. Appellants concede that the Hispanic pass rate was 81 percent of the white pass rate.

They argue, however, that if only 15 more Hispanics had passed, their pass rate would increase by 25 percent.

Appellants' challenge to the PAT must fail. The numerical differences are too small for meaningful comparison. *Contreras,* 656 F.2d at 1273 n.4 (statistics untrustworthy when minor numerical variations produce significant percentage fluctuations); *see also Morita v. Southern California Permanente Medical Group,* 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied,* 429 U.S. 1050 (1977) (statistical evidence derived from small universe has little predictive value and must be disregarded).

II. **Job-Relatedness**

Once plaintiffs have established a *prima facie* case of disparate impact for both blacks and Hispanics taking the written exam, the burden shifts to the County to prove the exam's job-relatedness. This circuit has held that the employer's burden is satisfied by showing "by professionally acceptable methods" that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Contreras,* 656 F.2d at 1280. *See also* 42 U.S.C. § 2000e-2(h) (Title VII expressly authorizes the use of "professionally developed" scored tests).

"A number of validation techniques are professionally acceptable." *Craig,* 626 F.2d at 664. Some courts use the detailed technical standards for validity studies set forth in the Uniform Guidelines. *See* 29 C.F.R. § 1607.14. It is undisputed that the County's validation studies in the present case do not meet the Guideline's standards. Few validation studies do, however. *See* C. Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts,* August 1984, at A-44.

This court has held that while noncompliance is "not necessarily fatal," it "diminishes the probative value of the defendants' validation study." *Craig*, 626 F.2d at 665. The Supreme Court has approved validation studies which did not meet the standards of the Uniform Guidelines.[10]

Appellants attempt to impeach the validation studies' reliability because they were prepared as a defense to litigation. As the County noted, it was impossible to assess the written exam's validity until after it was given and the job performance of successful applicants measured. Validation studies are time-consuming and expensive. *Teal*, 457 U.S. at 463 (Powell, J., dissenting). Preparation for litigation should not affect their reliability. *See Albemarle*, 422 U.S. at 433 n.32; *Contreras*, 656 F.2d at 1283.

Appellants also raise what they allege to be fatal flaws with the studies: (1) failure to utilize a representative sample, (2) failure to control for racial bias by training captains at the Fire Academy, and (3) failure to perform differential validation for blacks and Hispanics. These claims must fail.

Appellants improperly rely on *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), for their contention that a study must include those who failed. *Blake* was criticized in *Craig*, which approves of restricting the sample to those who passed. *See Craig*, 626 F.2d at 665 (sheriff's department not required to hire and train a sample of failing applicants to provide statisticians with more certain results).

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[10] *See National Education Assoc. v. South Carolina*, 434 U.S. 1026 (1978), *aff'g mem. United States v. South Carolina*, 445 F. Supp. 1094, 1113 n.20 (D.S.C. 1977); *Washington v. Davis*, 426 U.S. 229, 262-63 (1976) (Brennan, J. and Marshall, J., dissenting).

Concerning racial bias at the Academy, the district court relied on the credible testimony of defendant's expert, Ms. Lorrayne Alstadt, who found no bias. Finding No. 17(d)(2)(b). The County established that subjective evaluation in Academy grading was minimized through written standards for scoring drills. *See Albemarle*, 422 U.S. at 432-33 (vague instructions to supervisors too subjective). Appellants cannot show that the finding of no racial bias is clearly erroneous.

Finally, appellants rely on their expert, Dr. Kirkpatrick, for their contention that differential validation should have been performed for blacks and Hispanics. The district court rejected Dr. Kirkpatrick's testimony as "contradictory; unsupported by sufficient data, analyses of data, or relevant authority; *contra* the consensus of professionals in his field of expertise; and *contra* the opinions of defendant's witnesses, both expert and lay, which were supported by substantial relevant experience, sufficient data, analyses of data, or relevant authority." Finding No. 17(d)(3)(j).

As the Supreme Court recently wrote:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that it is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson, 105 S. Ct. at 1513. Moreover, appellants' insistence on differential validation lacks support in the technical community. *See* B. Schlei and P. Grossman, *Employment Discrimination Law* 154 n. 151 (2d ed. 1983).

Defendant's evidence demonstrated that the Academy teaches principles and techniques of firefighting including

hose lays, ladder techniques, use of ropes and knots, use of breathing apparatus, salvage and rescue techniques, and emergency medical training. These are the basic skills utilized on the job. Moreover, department policy requires that these basic skills be drilled by firefighters for two hours each day.

In conclusion, the County's validation studies demonstrate legally sufficient correlation to success at the Academy and performance on the job. Courts generally accept correlation coefficients above +.30 as reliable. *Id.* at 129 n.131; *see Craig*, 626 F.2d at 664 (accepting correlation coefficient of .60 as significant). As a general principle, the greater the test's adverse impact, the higher the correlation which will be required. *See, e.g., Guardians Association*, 630 F.2d at 105-06. Here, the correlation coefficients are statistically significant and can be considered reliable under prevailing legal principles.

III. **Alternative Selection Devices**

Appellants assert that they identified two alternative selection devices which met the County's legitimate hiring needs with less adverse impact on protected minorities: 1) the 1973-78 procedures, and 2) the banding procedure adopted in April 1981.

Documentation of the County's search for alternative selection devices is extensive. The County solicited information about selection procedures from 57 county and 44 city fire departments statewide. They surveyed professionally developed tests. Finally, they investigated alternative means of using the same procedures.

An employer is not required to choose the selection device with the least adverse impact on minority applicants. *Id.* at 110. Appellants contend they met the "virtually

impossible" burden of identifying alternative selection devices which satisfy the employer's legitimate hiring needs.

A. 1973-78 Procedures

The district court held that plaintiff's "unspecified" alternative procedures did not meet the County's needs. Finding No. 19(c). This finding is not clearly erroneous.[11]

Appellants rely on testimony from defendant's Fire Chief that recruits hired under Judge Gray's hiring order were equally as competent as those hired under the 1979 selection procedures. This testimony falls short of establishing legally sufficient alternative selection procedures.

Appellee introduced evidence that the applicant population in the quota years was of higher quality than in 1979 due to the larger percentage of veterans (71% as opposed to 43% in 1979), who are well suited to the discipline of fire departments. The disparity between selection rates is partially explained by a high quality applicant pool during the quota years and an "atypical" pool during the period at issue here.

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[11] The court found also that the proposed alternative was not legally available to the County in 1979 because it violated County ordinances and federal funding requirements. Finding No. 19(b)(3). We need not review this finding because of our holding that Finding No. 19(c) is not clearly erroneous. Specifically, we do not decide whether a less discriminatory alternative necessarily fails to meet an employer's hiring needs if it violates the employer's own regulations. As shown below, under these facts the court's finding that appellants have not satisfied their burden of establishing that another selection device without a similar discriminatory effect would serve the County's legitimate interest in efficient and trustworthy workmanship is not clearly erroneous. *See Dothard*, 433 U.S. at 329.

It is undisputed that the applicant pool for the 1979 exam was atypical due to special minority recruitment efforts. The percentage of minority applicants was almost double the corresponding percentage in the Civilian Labor Force. Plaintiffs' expert described the "stimulation effect" on minority applications created by the quota hiring years before 1979. Greater differences in the selection ratios are tolerated for an atypical applicant pool. 29 C.F.R. § 1607.4(D) (1984).

Moreover, there was considerable trial testimony concerning the cost savings of the 1979 procedures. Financial concerns are legitimate needs of the employer. *See Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981) (marginal cost of another hiring policy and implications for public safety are factors to be considered). The 1972-73 exam was shown to have less validity and greater financial impact than the 1979 exam. Moreover, the 1979 exam improved the chances of selecting qualified recruits.

Appellants' reliance on *Blake* for the proposition that compliance with Title VII may require modification of departmental policies is misplaced. *Contreras* recites the proper standards. In that case, the plaintiffs relied solely upon expert testimony that Hispanics generally do better in oral interviews than on written examinations. This court held that the use of oral interviews failed to satisfy the City's civil service hiring needs. *Contreras*, 656 F.2d at 1285 and n. 11. Similarly, appellants cannot establish that the procedures used from 1973-78 satisfied the County's civil service hiring needs in 1979.

Lastly, we note that plaintiffs' own expert criticized the validity of the oral interview when used as a ranking device.

When Judge Gray's hiring order was in effect, final eligibility was based solely on ranked oral interview scores.

B. 1981-82 Procedures

Appellants also advance the banding system as a second less discriminatory alternative. They correctly assert that the court's findings fail to address this alternative.

District court findings are adequate if they are sufficiently comprehensive to provide a basis of decision and are supported by the record. *See Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955). Here, appellants failed to present evidence on the impact of the banding rule alone.

The imposition of the civil service banding rule coincided with Judge Lucas' injunction order. At oral argument, appellants conceded that it is impossible on the present record to evaluate the banding rule's impact on minority hiring.[12]

In conclusion, appellants have not sustained their burden of identifying alternative selection devices to the 1979 written exam that met the County's legitimate hiring needs.

IV. Evidentiary Rulings

Lastly, appellants argue that the court erred in excluding defendant's Exhibit 248 from evidence. This exhibit contains a legal opinion that the 1979 selection procedures had an adverse impact on minority applicants. Evidentiary rulings are not reversible absent clear abuse of discretion. *See M.A.P. Oil Co., Inc. v. Texaco, Inc.*, 691 F.2d 1303, 1310 (9th Cir. 1982). We find no abuse of discretion.

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[12] The County asserts as a defense that the banding rule was not legally available in 1979. We decline to adopt this "legal unavailability" defense because it is unnecessary to our holding.

In May 1982, U.S. Magistrate James Penne ruled that the portion of Exhibit 248 entitled "Firefighter - EEO Liability Analysis" was not discoverable because the attorney-client privilege attached to it. He found also that the document had been produced inadvertently during discovery and that the privilege had not been waived. It is undisputed that the appellants never appealed the magistrate's ruling. *See* Rule 4.1, *Local Rules Governing the Duties of the Magistrates of the United States District Court, Central District of California* (1981) (ten days for appeal of magistrate's order on non-dispositive motion).

At trial, the plaintiffs sought to elicit testimony about the exhibit from the author, Frank Frazier. The plaintiffs asserted that the document was included in the County's exhibits offered at trial. The court sustained the defendant's objection on the ground that the plaintiff's challenge to the magistrate's ruling was not timely presented.

Voluntary disclosure of a privileged attorney communication constitutes waiver. *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). Inadvertence "does not as a matter of law prevent the occurrence of waiver." *Id.* It is only one factor to be considered.

However, the County denies that the challenged exhibit was part of its case. Nor was the exhibit admitted into evidence on the first day of trial as appellants assert. The court noted that the exhibit was undated, unsigned and unaddressed. In sum, appellants fail to allege facts or other proof that the court abused its discretion in rejecting the exhibit.[13]

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[13] Appellants include other exhibits in their Excerpt of Record at pages 178-255 which were not admitted into evidence. They do not

CONCLUSION

Appellants asserted at oral argument that they should prevail because they established a *prima facie* case of adverse impact and the existence of an alternative selection device that selected equally competent firefighters. We disagree.

This argument ignores the good faith efforts by the County to prove job-relatedness through expensive and time-consuming validation studies. It ignores also the County's financial needs in providing cost-effective Academy training. Finally, it shifts the focus away from an analysis of this exam's discriminatory impact on minority applicants.

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications." *Griggs*, 401 U.S. at 430. "The touchstone [of Title VII] is business necessity." *Id.* at 431. Unlike the situation in *Griggs*, the County adopted the challenged procedures after meaningful study of their relationship to job performance ability. Appellants would have us overlook those efforts.

In conclusion, appellants established a *prima facie* case of disparate impact against blacks and Hispanics for the written exam. However, they failed to demonstrate that the court's finding of job-relatedness was clearly erroneous. Nor did they establish an alternative selection device having comparable business utility and less adverse impact.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5900
DC# CV 79-3843-MML
Central California

HERSHEL CLADY, et al.,
Plaintiffs-Appellants,
vs.

COUNTY OF LOS ANGELES,
Defendant-Appellee.

ORDER DENYING REHEARING AND REJECTING THE EN BANC SUGGESTION, AND AMENDING OPINION

Filed November 13, 1985

Before: WRIGHT, ALARCON and NORRIS, Circuit Judges.

The appellants' Petition for Rehearing and En Banc Suggestion was untimely filed but has been considered by the court. Rehearing is denied. The active judges have considered the en banc suggestion and have voted to deny it. It, too, is denied.

These modifications have been made in the opinion filed on September 10, 1985:

At page 6 of the slip opinion, fifth full paragraph, (page 5, line 7, of typed manuscript), the first sentence will be changed to read: "Next was the administration of an oral

interview to all applicants qualifying on the written exam."

At page 11 of the slip opinion, (page 10, line 8, of typed manuscript), the second full paragraph will be deleted and replaced with the following two paragraphs:

> The recent Supreme Court decision in *Anderson v. City of Bessemer*, 105 S. Ct. 1504 (1985), is instructive. There, the district court adopted petitioner's findings and conclusions following issuance of a preliminary memorandum. The Court rejected the Fourth Circuit's suggestion that the record should be closely scrutinized. *Id.* at 1510-11. Because the party's findings were not "uncritically accepted," the clearly erroneous standard was retained. *Id.* at 1511.
>
> Similarly, we note that Judge Lucas did not uncritically accept the County's proposed findings. He was careful to reject certain credibility findings with which he disagreed. Under these circumstances, "[t]here is no reason to subject those findings to a more stringent appellate review than called for by the applicable rules." *Id.*

At page 16 of the slip opinion, paragraph 3, (page 17, line 1, of typed manuscript), the final sentence will be deleted, beginning with "[a] generalized attack . . ." and ending "with the court's finding."

On page 25 of the slip opinion, the first full paragraph (page 27, line 6, of typed manuscript) will be deleted and the following language substituted:

> Through a meticulous validation analysis, conducted as soon as the 1979 recruit classes

could be tested, the County met its burden of showing that the challenged exam was sufficiently correlated with successful job performance. The County also demonstrated that the exam met its need by accurately screening candidates on the basis of their proficiency in a relatively inexpensive fashion. Finally, plaintiffs failed to establish that less discriminatory alternatives available to the County were equally tailored to its legitimate hiring needs.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-3843-MML

HERSHEL CLADY, FREDERICK VEGA, MARIO MEJIA, GREGORY PLAIN, ALBERT RUBALCABA, MICHAEL TORRES, JULIUS JANISSE, ROGER MAYFIELD, SERAFIN ESPINOZA, etc.,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES,

Defendant.

JUDGMENT

Entered May 10, 1983

This action came on for trial before the Court, Honorable Malcolm M. Lucas, District Judge, presiding, and the issues having been tried and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiffs its costs of suit.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Judgment, together with copies of the Findings of Fact and Conclusions of Law filed concurrently herewith, on counsel for the parties in this matter.

DATED: May 5, 1983

Malcolm M. Lucas
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-3843-MML

HERSHEL CLADY, FREDERICK VEGA, MARIO MEJIA, GREGORY PLAIN, ALBERT RUBALCABA, MICHAEL TORRES, JULIUS JANISSE, ROGER MAYFIELD, SERAFIN ESPINOZA, etc.,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed May 6, 1983

FINDINGS OF FACT

1. This is a class action for injunctive relief brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII").

The parties are:

a. A plaintiff class which has been conditionally certified by an order of this Court, filed May 23, 1980, and which is described as follows:

(1) All Black and Mexican-American applicants for the position of firefighter with the Los Angeles County Fire Department whose applications were processed under the

1979 selection procedures and who were not hired by defendant; and

(2) All Black and Mexican-American applicants for the position of firefighter with the Los angeles County Fire Department who will apply in the future;

b. The named plaintiffs and class representatives who are Mario Mejia, Gregory Plain, Albert Rubalcaba, Michael Torres, Julius Janisse, Roger Mayfield and Serafin Espinoza; and

c. The defendant which is the County of Los Angeles. Each of these parties have been served and have appeared. All other parties named in the pleadings and not identified in the preceding paragraph are now dismissed.

The pleading which raises issues is the First Amended Class Action Complaint for Injunctive Relief in Connection with Employment Practices, filed February 19, 1980.

2. Federal jurisdiction and venue are invoked upon the grounds that the United States District Court have been specifically granted jurisdiction for all Title VII actions pursuant to Section 706(f)(3) of Title VII, U.S.C. §2000e 5(f)(3). Plaintiffs have exhausted all of the administrative remedies required by Title VII by timely filing charges of discrimination and obtaining the "right to sue" letters required by Section 706. Venue is proper in the district in which the unlawful practices are alleged to have been committed. Jurisdiction has been admitted.

3. The County initiates an "examination" process whenever it intends to fill job openings in a job classification. The purpose of this process is to establish an "eligible list" of qualified applicants. The eligible list then remains in effect for a period of time during which all appointments to the job classification must be made from this list.

4. The first step in the 1979 Firefighter Examination process was the posting of "bulletins" in public places and the commencement of recruitment of applicants. The bulletins announced the dates for filing applications, stated the minimum job qualification and briefly described the examination process.

5. As a part of the recruitment efforts, notification was given to all persons who had filed "notice of interest" cards with the County since the last application period. Applications were then accepted at several County offices located in various areas of the County. In addition to the recruitment efforts by County personnel, defendant contracted with an outside organization, the International Association of Firefighters, to recruit and prepare minority candidates for the 1979 Firefighter Examination under its Labor Recruitment Program.

6. A written test was then administered to all applicants who appeared on the scheduled testing date and who met the minimum requirements, including the education requirement. Those applicants who did not meet the minimum requirements were excluded from participation in the written test. Applicants who failed the written test were excluded from further consideration.

7. The next step in the examination was the administration of an oral interview to all applicants qualifying on the examination. At the oral interview, the applicant's education, experience and personal suitability for performing firefighter duties were assessed by a panel of three persons.

8. An "eligible list" was then created which ranked the applicants who qualified on both the written test and oral interview. The relative ranking for these "candidates" was determined by weighting the score received on the written

test by 25% and the oral interview by 75%. A ten point veteran's credit was added to this weighted score for qualifying veterans. As openings arose, the candidates were administered a physical agility test on a pass/fail basis.

9. Selection of candidates from the eligible list was made in accordance with a "rule of three." This rule requires the County to consider only the top three candidates on the list for the next firefighter opening. The result is that the rank ordering on the list governs when a candidate will be considered for an opening. The County Fire Department had primary responsibility for selecting candidates from the eligible list.

10. The "rule of three" was replaced on April 9, 1981 with a new Civil Service Rule which authorized a "banding" system for selecting candidates from an eligible list. Under the banding system, discretion is given to the hiring department to select for hire any candidate whose final score is within a "band" of scores. The hiring bands, in order, are as follows: (a) 100 plus (called the veteran's band because only those with the 10 point veteran credit can score over 100); (b) 95-100; (c) 89-94; (d) 83-88; (e) 77-82; and (f) 70-76. Appointments are made from the highest ranking band until fewer than five (5) persons are available for appointment from that band. There have been three recruit classes appointed since April 9, 1981 (Classes 58-60) using the banding system.

11. Appointments from the eligible list are made to the position of Firefighter. All newly hired firefighters must successfully complete a training program in the Fire Academy and a one year probation period.

12. All entry level firefighters, including those previously employed with other fire departments, must undergo the above described examination process. No exceptions were

made prior to the administration of and completion of appointments from the 1979 Firefighter Eligible List.

13. The issues to be determined by the Court address only liability. Only if the Court finds liability do issues as to remedy need be determined. The issues to be addressed as to liability are as follows:

a. Whether the 1979 written test administered to applicants for firefighter positions with defendant is violative of Title VII. Relevant to this issue are the following subissues:

(1) Whether the 1979 written test had an actionable adverse impact on Black and Hispanic applicants as determined by:

(a) Whether the use of the written test as a pass/fail device had an adverse impact on Black and Hispanic applicants; and

(b) Whether the use of the written test as a ranking device for those applicants who received a passing score had a further adverse impact on Black and Hispanic applicants.

(2) Whether the written test has been validated as being job-related in accordance with professionally accepted methods.

(3) Whether, even if defendant fails to show the test has been validated in accordance with professionally accepted standards, use of the written test can be justified as job-related, a business necessity or otherwise shown to have a legally sufficient basis; and

(4) Whether there is an alternative selection practice which equally would meet defendant's needs and which would have had a lesser adverse impact on Black and Hispanic applicants.

b. Whether the education requirement used by defendant is violative of Title VII. Relevant to this issue are the following subissues:

(1) Whether the requirement has an adverse impact on Blacks and Hispanics who otherwise would have applied for firefighter positions with defendant;

(2) Whether the requirement has been validated as being job-related in accordance with professionally accepted methods, if such validation is legally required; and

(3) Whether, even if defendant fails to show that the education requirement has been validated in accordance with professionally accepted standards, use of the education requirement can be justified as job-related, a business necessity or otherwise shown to have a legally sufficient basis; and

(4) Whether there is an alternative selection practice which equally would meet defendant's needs and which would have had a lesser adverse impact on Blacks and Hispanics.

c. Whether the physical agility test used by defendant is 1979 is violative of Title VII. Relevant to this issue are the following subissues:

(1) Whether plaintiffs have standing to challenge the physical agility test;

(2) Whether the physical agility test had an adverse impact on Hispanic applicants;

(3) Whether the physical agility test has been validated as being job-related in accordance with professionally accepted methods;

(4) Whether even if defendant fails to show that the physical agility test has been validated as being job-related in accordance with professionally accepted standards, use

of the physical agility test can be justified as job-related, a business necessity or otherwise shown to have a legally sufficient basis; and

(5) Whether there is an alternative selection practice which equally would meet defendant's needs and which would have had a lesser adverse impact on Hispanics.

d. Whether plaintiffs have standing to challenge defendant's upcoming hiring process for firefighters and, if so, whether the hiring process is a continuation of a pattern and practice of discrimination against Blacks and Hispanics.

14. There is no meaningful adverse impact against Hispanics or Blacks resulting from the 1979 Firefighter Examination when considered as a single selection procedure.

a. If only the first four classes hired as a result of the 1979 Firefighter Examination are considered:

(1) No statistically significant difference between the hires of Blacks and Hispanics and their representation in the Civilian Labor Force ("CLF") is found;

(2) No meaningful adverse impact is found against either Blacks or Hispanics when their selection rates are compared to those for Whites, in that:

(a) If only 10 more Blacks and 4 more Hispanics had been hired, the apparent violation of the 80% "rule of thumb" of the Uniform Testing Guidelines of 1978, 29 C.F.R. § 1607 *et seq.*, § 1607.4(D), would not be statistically significant.

(b) Ten more Black hires would constitute only 2.3% of 436 Black examinees;

(c) Four more Hispanic hires would constitute only .8% of 525 Hispanic examinees.

b. If only the last 3 classes hired are considered:

(1) The percentage of Blacks hired is virtually identical to their representation in the CLF (i.e., 10% hired; 10.8% in the CLF); the percentage of Hispanics hired is 2.2 times their representation in the CLF (i.e., 30% hired; 13.5% in the CLF); the percentage of Whites hired is only approximately 3/4 of their representation in the CLF (i.e., 55% hired; 71.9% in the CLF);

(2) No meaningful adverse impact against Blacks is found when their selection rate (2.8%, i.e., 12 Black hires of 436 Black examinees) is compared to Whites (3.6%; i.e., 66 hires of 1816 examinees) and no adverse impact at all against Hispanics is found when their selection rate (6.9%; i.e., 36 hires of 525 examinees) is compared to Whites, in that:

(a) As to Blacks, their selection rate of 2.8% is only .1% less than 80% of the selection rate for Whites (i.e., 80% of 3.6% 2.9%);

(b) Only 4 more Blacks hired (.9% of 436 Black examinees) would make their selection rate equal to Whites;

(c) As to Hispanics, their selection rate is almost twice that for Whites;

c. If all the classes hired are considered together;

(1) No statistically significant difference between the percentage of Blacks hired (7.5% or 8%; i.e., 21 of 280 total hires) and their representation in the CLF is found; the percentage of Hispanics hired is 1 1/2 times their representation in the CLF; the percentage of Whites hired is less than their representation in the CLF (68.2% hired; 71.9% in the CLF);

(2) No meaningful adverse impact is found against Blacks when their selection rate (4.8%; i.e., 21 Blacks hired

of 436 examinees) is compared to Whites (10.5%; i.e., 191 of 1816); no adverse impact at all is found against Hispanics when their selection rate (10.7%; i.e., 56 hires of 525 examinees) is compared to that for Whites (10.5%; i.e., 191 hires of 1816 examinees), in that:

(a) As to Blacks, the number of additional hires to meet the 80% rule is relatively insignificant (5.2%, which is an additional 15.5 or 16 hires of 436 examinees to bring the Black selection rate to 8.4%, which is 80% of 10.5%);

(b) As to Hispanics, their selection rate exceeds that for Whites;

d. The appropriate comparison for the determination of selection rates is to persons who participated in the written test ("examinees") and not applicants since all but 4 of the 1006 who did not appear for the written test voluntarily withdrew.

e. The appropriate figures in this regard are those based upon ethnic/racial codes assigned by monitors when the test is actually administered, since they do not depend upon the interest of the applicant in coding himself in the most advantageous manner nor do they depend upon the ability of the applicant to place himself in the proper ethnic/racial category. While the monitor may also be subject to error, plaintiffs adduced no evidence to establish that the coding system used was less trustworthy than the method they preferred;

f. The relatively small number of minorities to either eliminate any indication of adverse impact or to make it insignificant (i.e., where the apparent differences in selection rates or representation could have occurred by chance) make the statistical differences between Whites and minorities unreliable.

g. The applicants to and participants in the 1979 Firefighter Examination comprised an "atypical applicant pool," in that:

(1) Minority applicants exceeded their representation in the CLF by almost 2 to 1 (i.e., 20% Black applicants v. 10.8% representation in the CLF; 22% Hispanic applicants v. 13.5% in the CLF); while White applicants were only approximately 3/4 their normal representation in the CLF (i.e., 54% White applicants v. 71.9% in the CLF);

(2) Minority examinees exceeded their representation in the CLF by almost 1 1/2 to 1 (i.e., 15% Black examinees v. 10.8% in CLF; 19% Hispanic examinees v. 13.5% in CLF), while White examinees were 11% under their representation in the CLF (i.e., 64% White examinees v. 71.9% in the CLF);

(3) Special recruitment efforts were focused upon minorities, especially Blacks, to ensure sufficient numbers would apply to meet the then required quota in an attempt to achieve required selection rates without selective certification by race; part of those special recruitment efforts were to provide exposure and preparation to minorities who had not had such exposure to nor prepared themselves for the job of firefighter by taking examinations in other jurisdictions. The underrepresentation of minorities in firefighter jobs was a nationwide phenomenon, at the time recruitment efforts for the 1979 Firefighter Examination were being made.

(4) The recruitment efforts of the International Association of Firefighters may have encouraged participation in the 1979 Firefighter Examination by minorities who would not normally have participated.

h. The increase in selection rate of Blacks and Hispanics in the last 3 classes hired from the 1979 Firefighter

Examination eligible list was attributable to the adoption of the "banding" rule.

(1) While a preliminary injunction was in effect during the period of hiring, which required 35% of each class hired be jointly Blacks and Hispanics, defendant exceeded the Court's order by hiring Blacks and Hispanics at a 40% rate and did so within the Civil Service Rules.

(2) The banding concept was one which was developed years prior to the instant lawsuit and would have been adopted sooner had it not been for the negotiation procedure required by State law and the opposition of the unions involved in that procedure.

15. If the written test part of the 1979 Firefighter Examination is considered as a discrete selection device, no actionable adverse impact against Hispanics appears to exist.

a. The passing rate of Whites on the written test used as part of the 1979 Firefighter Examination was 75.7%.

b. The passing rate for Hispanics was 55.6%.

c. 80% of 75.7% = 60.6%.

d. The difference between the passing rate achieved by Hispanics and that which would be within 80% of the passing rates for Whites is 5%.

e. Plaintiffs' expert testified that plus or minus 5% on either side of the 80% rule would not necessarily be a practically significant difference even if it were statistically significant, and thus not a definitive indication of meaningful adverse impact.

f. Five percent of 525 Hispanic examinees is a fraction more than 25 Hispanics, again an instance where relatively small number differences make the statistical differences

between the pass rates of Whites and Hispanics unreliable as evidence of actionable adverse impact.

g. By contrast, the differences in pass rates between Whites and Blacks are more substantial and are probably not due solely to relatively small number differences (e.g., the difference between 80% of the pass rate for Whites and Blacks is 26.7%, and 26.7% of the Black examinees is a fraction more than 116).

h. The extent of the exacerbation of the apparent adverse impact of the written test due to atypical applicant pools of Blacks and Hispanics cannot be accurately estimated but would be substantial enough to mitigate any finding of statistical adverse impact against Hispanics in light of the small number differences involved and the lack of statistically significant differences in mean written test scores between Whites and Hispanics in the 1979 written test validation sample (i.e., 77.4 for Whites v. 74.5 for Hispanics).

i. No evidence was adduced sufficient to establish the additional adverse impact of the written test as a weighted rather than pass/fail selection device.

16. Assuming actionable adverse impact is shown for the written test, at least against Blacks, defendant has validated its use as job related according to professionally accepted standards.

a. Defendant has conducted three validation studies, all of which meet professionally accepted standards, which establish the written test as a significant and meaningful predictor of performance in the Fire Academy and that the training given in the Fire Academy is related to job performance as a firefighter in the field. These studies are in chronological order: The Firefighter Validation Study: Los Angeles County, dated February, 1980; the 1979

Firefighter Validation Study Supplement: Los Angeles County, dated June, 1980; and an Analysis of the Relatedness of Academy and Recruit Follow-up Examinations at the Los Angeles County Fire Department, dated June 8, 1981. The foregoing studies will be referred to hereinafter, respectively, as the "Study", the "Supplement" and the "Academy Study."

b. The Study established the written tests given as part of firefighter examinations during the period of the hiring order imposed by the district court in *Davis v. County of Los Angeles*, 8 FEP Cases 239 (C.D. Cal. 1973), vacated, 440 U.S. 625 (1979), as significant and meaningful predictors of success in Fire Academy training. Those written tests were shown to be parallel forms of the written test given in 1979 as part of the firefighter examination, and thus the Study constituted presumptive evidence of the validity of the 1979 Firefighter written test. Significant and meaningful correlations with the relevant job performance criteria in the Academy were shown by the Study. When corrected for restriction in range, as was appropriate under the existing conditions, the correlations were in the near large or large range.

The Study was conducted in accord with professionally accepted standards and with a particular eye to meeting the requirements of the federal selection guidelines. In that regard, a test fairness study was conducted. Analyses for single group validity, differential validity; and differential prediction were conducted. The results of the first two analyses showed no significant differences in terms of validity coefficients favoring one group over another. However, the differential prediction analysis revealed that the written test will tend to *over-predict* success for minorities, most especially Blacks. Therefore, if anything,

the written test would tend to predict greater success for Blacks in the Fire Academy than would be found in reality. Actual experience verifies the findings of this analysis.

The Study also described the manner in which the cutoff score for the 1979 written test was established. This score was applied to all ethnic groups equally with no adjustment. This score was set at 53 correct. The 53 correct cutoff was only three above the lowest written test score (50) achieved by any examinee who was hired and graduated from the Academy. That recruit also earned the maximum number of deficiency points of any graduating recruit. The establishment of 53 as the cutoff score was a management decision intended to maximize the number of minorities who would be admitted into the subsequent parts of the examination.

A detailed job analysis was done of the firefighter function and all its facets. The job analysis included in the Study was further supplemented by the Academy Study and testimony of subject matter experts at trial.

The "Data Analysis" section of the Study (beginning at page 59 thereof) reveals that the performance of Whites and Hispanics on both the written test and in the Academy is very closely parallel. By contrast, Blacks perform significantly lower in both the written test and in the Academy. The attrition rate from the Academy among the ethnic groups corresponds directly with their performance on the written test and in the Academy in terms of the performance criteria which significantly correlates with the written test.

c. The purpose of the Supplement was to update the findings of the Study. The primary thrust of the Supplement is the same as that for the Study: to present validity coefficients between the written test and the

performance criteria in the Fire Academy. As a secondary analysis, the data presented in the Supplement was compared to the data presented in the Study. This provided for comparisons between the pre 1979 firefighter examinations and the 1979 Firefighter Examination.

A section on test utility was included in the Supplement. That analysis established that substantially more qualified candidates are identified through the use of the written test than would be identified if it were not used. This utility of the 1979 Firefighter written test was further established by uncontradicted testimony of defendant's experts that the correlation coefficients themselves indicate the percentage improvement in prediction of the criteria to which the selection device correlates than use of no selection device or random selection. The major conclusions of the Supplement are as follows:

(1) The firefighter written test is a valid measure of Academy training. It significantly and meaningfully correlated with the three criteria for which sufficient data was available. It should continue to be used as a tool to select recruits for Academy training.

(2) Whites differ from Blacks both on the predictors and the criteria (i.e., the written test among others and the performance criteria in the Academy) but Whites *did not* differ from the Hispanics on either.

(3) An updated adverse impact analysis was found to produce results similar to those presented in the Study. More specifically, no meaningful adverse impact was found for the 1979 Firefighter Examination as an integrated selection procedure for an interview or physical agility selection components.

(4) The utility of the written test was shown in that it selected more qualified candidates than would have been

selected if it were not used. The exact percent of increase varied depending upon what combination of variables were examined. However, it was found to range from 9% to 48% for the corrected validity coefficients, which were found to be the most appropriate under the circumstances.

The third conclusion establishes what the Study inferred — that Whites as a group and Hispanics as a group perform substantially identically on both the predictors and the performance criteria. However, both Whites and Hispanics perform substantially differently from Blacks. Any inference that the written test has a discriminatory impact against minorities is controverted by the fact that Hispanics, who are a minority and who would be expected to suffer more from a non-job-related written test than Blacks, actually perform the same as Whites and significantly better than Blacks.

The use of the written test can be translated into substantial savings of training costs. The updated direct training cost per recruit is more than $9,500. The use of the written test increases the ability to identify those recruits who will successfully complete training from 9% to 48%. Nine percent of a 40-man class is approximately four persons; 48% of a 40-man class is approximately 19 persons. The saving of training costs realized by the utilization of the written test is, therefore, substantial and may vary between in excess of $38,000 and in excess of $180,500.

The Supplement found that correlation coefficients for the 1979 written test and the performance of recruits actually hired as a result of its use is even higher than those found for the written test given as part of the pre-1979 firefighter examinations and the performance of recruits hired from them. In fact, the correlation coefficients for the

1979 written test are in the highest range of correlation coefficient values which have been found. In some cases the correlation coefficients found actually exceed the highest correlation coefficients normally found.

Table 3-5 of the Supplement (Page 28 thereof) sets forth the attrition rate of recruits from the classes hired from the 1979 Firefighter Examination to the date of the Supplement. Those figures indicate that attrition rate of Whites and Hispanics were identical as of the date of that table. However, the attrition rate of Blacks was almost three times as high. The greater attrition rate of Blacks is expected and confirms all the other data which indicate that the performance of Blacks as a group is substantially poorer on both the written test and in the Academy.

The figures on Table 3-5 also provide a comparison between the attrition rate from the Academy during the period of the prior Court Order and the attrition rate from the Academy as a result of the application of the 1979 Firefighter Examination, including the written test. The overall attrition rate during the period of the prior Court order was 10%, and 69% of all terminees were Black. The attrition rate of recruits hired as a result of the 1979 Firefighter Examination is 8% overall and 18% of all terminations were Black. Based on the foregoing, the conclusion can be reached that the 1979 Firefighter Examination procedure is superior to those that were in effect prior to that time under the Court Order in terms of reducing the attrition rate from the Fire Academy. In reference to Blacks in particular, it has substantially reduced the percentage of terminees who are Black. Nevertheless, Blacks have a substantially higher attrition rate than Whites or Hispanics. That result confirms the

findings of the Study that the written test over-predicts success for Blacks.

The "Data Analysis" section of the Supplement assesses in detail the virtual identity of the performance of Whites and Hispanics on the 1979 Firefighter Examination procedure. It also sets forth in detail the substantially poorer performance of Blacks both in terms of the predictors (i.e., all parts of the examination process) and performance in the Academy.

d. The Academy Study was commissioned by defendant to assess the validity of the written examinations used at the Academy in evaluating firefighter trainees. The conclusion reached after the study was conducted was that the subject examinations were representative of important or critical work behaviors performed by firefighters and that the knowledges tested were of high importance. The examinations exhibited substantial content validity.

Plaintiffs did not contest the appropriateness of the performance criteria used in the Academy as adequate measures of job performance. The evidence adduced by defendant is sufficient to establish that the criteria of deficiency points, graduation/termination, Academy score and Station score are appropriate and adequate measures of job performance.

17. Plaintiffs' riticisms of defendant's validation studies are insufficient to preclude a finding of job-relatedness of the written test.

a. The Study is relevant as presumptive evidence of the validity of the 1979 Firefighter written test, and parts thereof (e.g., job analysis, assessment of criteria bias, fairness analysis, etc.) are relevant to support the findings of the Supplement.

b. The Supplement could not have been completed prior to administration of the 1979 Firefighter written test and until sufficient data on performance criteria was available; use of actual recruits in the validation sample is the professionally preferred procedure.

c. The evidence adduced by plaintiffs is insufficient to establish their contentions that:

(1) The sample utilized was not representative of actual applicants;

(2) Racial bias existed in the Academy sufficient to require controls for the effect of such bias in defendant's criterion related validation studies;

(3) The written test was less valid for Blacks and Hispanics than for Whites.

d. Plaintiffs' only evidence relevant to the issue of validity consisted of the testimony of Francis V. Frazier, former Section Chief of the Test Research Section of defendant, under whose general supervision the criterion related studies were conducted; the cross examination of Lorrayne Alstadt, the person who actually conducted the criterion related validation studies for defendant; and the rebuttal testimony of plaintiffs' expert witness, Dr. James J. Kirkpatrick.

(1) Mr. Frazier's testimony established that:

(a) Prior to the criterion related validation studies of Ms. Alstadt, he had independently determined that the written test developed for use in the 1979 Firefighter examination was a valid predictor of Academy performance, although he recommended its use as an unweighted part of the examination, primarily due to the magnitude of the correlation coefficients obtained (they were substantially smaller than those obtained by the studies) and because of

his desire to minimize potential adverse impact upon minorities and to maximize efforts to meet the affirmative action objections of the defendant; moreover, the initial recommendation was made prior to the vacating of the *Davis* quota order when the need to maximize the passing rate of minorities in order to meet the quota was of paramount concern;

(b) Efforts to conduct a formal criterion related validation study were begun as a result of the imposition of the *Davis* quota hiring order, years before the instant lawsuit;

(c) The studies conducted by Ms. Alstadt were under Mr. Frazier's general supervision, and he made all decisions as to whether or not it should be conducted, its purpose and general structure;

(d) However, the analyses contained within the studies were performed by Ms. Alstadt independently, and her assessments were based solely on her statistical expertise and the prevailing standards in the professional testing community and in the Uniform Testing Guidelines as interpreted by her;

(e) None of Ms. Frazier's testimony contradicted the conclusion of the validity of the 1979 Firefighter written test.

(f) Mr. Frazier was a credible witness.

(2) Ms. Alstadt's testimony established that:

(a) Nothing that was feasible and required by either the Uniform Testing Guidelines or the professional standards was omitted from her studies;

(b) The assessment of bias in the Academy performed by Ms. Alstadt revealed none; an independent analysis reaching the same conclusion was reviewed by her as part

of her assessment; moreover, a statistical analysis of consistency in the deficiency points assessed among ethnic groups revealed no inconsistency of assessment between Academy administrations; such analysis would probably detect significant impact, if any, of the biased grading of a particular training captain.

(c) The increase in correlation coefficients from the written tests during the quota years could result from many factors; the larger coefficients, in and of themselves, established that the 1979 written test was the more valid test despite their similarity;

(d) There was no inaccuracy in the data from which the 1979 Firefighter written test correlation coefficients were obtained;

(e) Inclusion of failing examinees would not necessarily have improved the data in terms of the assessment of validity except to increase the correlation coefficient by increasing the range of differences;

(f) The samples used in the studies were representative of all examinees albeit restricted to those who passed;

(g) The utility analysis in the Supplement, while based upon estimates which are affected by variables not measured by the written test, nevertheless improves the chances of selecting qualified recruits from 9% to 48%;

(h) None of Ms. Alstadt's testimony contradicted the conclusions of the validity studies performed by her;

(i) Ms. Alstadt was a credible witness.

(3) Dr. Kirkpatrick's rebuttal testimony established that:

(a) Certain procedures were required, in his opinion, for a professionally acceptable validation study;

(b) Certain other procedures, in his opinion, were not required for a professionally acceptable validation study;

(c) In his opinion, the validation sample utilized in the Supplement was not representative of the applicant pool simply because of the difference in mean test scores;

(d) The higher mean scores of the sample indicated that they were a select group and any correlation coefficient obtained on that data would be lower due to restriction in range;

(e) Nevertheless, corrections for restriction in range were considered by Dr. Kirkpatrick an inflation of the correlation coefficient which is unjustified and only of academic interest;

(f) Bias in the criteria must be assessed and corrected if found; in his opinion, bias could exist simply because Blacks' mean score on deficiency points was substantially higher than deficiency point means of Whites and Hispanics;

(g) In his opinion, the assessment of potential bias in the Study was insufficient, based solely upon his subjective determination;

(h) In his opinion, the correlation coefficients found in the Study were distorted by an "artifact" because of their very consistency and because none of the correlation coefficients for any of the individual minority ethnic groups displayed statistical significance despite the fact that the sample's correlation coefficients were larger than his "minimum standard" of .30 and statistically significant.

(i) In his opinion, each group should have validity rather than the sample as a whole before the correlation coefficient for the sample can be considered reliable; in his opinion, each group was sufficiently large to display a statistically significant correlation coefficient if a correlation existed despite his not having performed a power analysis, just such a power analysis was performed in the Study, and the only group which was of sufficient size was Whites for the

criterion of deficiency points. All other criteria required the sample to be used in the calculation before sufficient power was shown.

(j) Dr. Kirkpatrick's opinions were contradictory; unsupported by sufficient data, analyses of data, or relevant authority; *contra* the consensus of professionals in his field of expertise; and *contra* the opinions of defendant's witnesses, both expert and lay, which were supported by substantial relevant experience, sufficient data, analyses of data, or relevant authority.

18. The use of the written test is necessary to ensure the safe and efficient operation of the Fire Department and to allow the selection of qualified firefighters within the budgetary constraints of defendant.

a. Given the substantial amounts of money that can be saved by the use of the written test, its continued use must be considered necessary for the efficient operation of the Fire Department. In addition to the direct training costs, there are the substantial indirect effects of unnecessarily high training costs in terms of the safety of firefighters in the field and the ability to provide services to the public. Since the firefighters in the field function as a team, any reduction in the staffing level necessarily impacts upon the safety of each individual firefighter. Even under present conditions, it is often necessary for firefighter companies to function under the recommended staffing as determined by insurance authorities.

b. The effect of reduced staffing per fire company as well as a potential reduction and actual reduction in the number of fire companies available to serve the public sufficiently establishes the potential for the reduction of services to the public. In many cases even under ideal conditions, the training of recruits necessarily reduces the

number of firefighters available in the field since no separate training budget is provided to the Fire Department.

19. Plaintiffs have failed to show the existence of an alternative selection device to the written test which would serve defendant's legitimate interest in predicting the success of recruits in the Fire Academy and would have a less disproportionate impact upon minorities.

a. Plaintiffs failed to specifically identify what selection procedure would serve as a suitable alternative, referring only to the selection procedures used during the quota years collectively as the alternative, with an emphasis on an unweighted written and 100% interview.

b. Plaintiffs failed to show that the unspecified alternative procedure would produce less adverse impact.

(1) Differential cutoffs by race were set in each firefighter examination during the quota years to ensure sufficient numbers of minorities going forward to each successive part.

(2) Selective certification by race was used so that Blacks and Hispanics were hired from separate lists to ensure the hiring of sufficient numbers to meet the quota.

(3) Absent a court order, both differential cutoffs and selective certification by race are precluded by local ordinance and merit system rules, as well as federal funding requirements to which defendant is subject.

(4) Absent the quota, the selection devices utilized would have produced severe adverse impact per the uncontradicted opinion of defendant's expert, Mr. William Ruch, whose qualifications were well established and impressive and whose testimony was consistent, well supported by relevant

data, analyses of such data and relevant authorities, and was otherwise wholly credible.

(5) The PAT administered in 2 out of the 3 procedures was similar to the 1979 PAT.

(a) Plaintiffs challenge the 1979 PAT as having adverse impact and as being invalid.

(b) The previous PATs were weighted 25%; therefore, if, indeed, weighing a selection device increases adverse impact as plaintiffs contend, the earlier PATs would be expected to have greater adverse impact than the 1979 PAT. By contrast, the 1979 PAT is qualifying only.

(6) In none of the previous selection procedures was the interview given more weight than in the 1979 Firefighter Examination, and the interview is the only selection device which has been shown to have no adverse impact.

(7) While the written tests in the quota years were not weighted parts, they were, in fact, ranking devices since only the top scorers were allowed to proceed to subsequent parts of the examination; in 1977 only the top 1000 were allowed to proceed while 1815 plus were allowed to proceed in 1979.

c. Plaintiffs failed to show that the unspecified alternative procedure equally met defendant's needs.

(1) Analysis of terminations indicates that while the overall termination rate remained approximately the same as during the quota years, the use of the common cutoffs in the 1979 Firefighter Examination substantially reduced the percentage of terminees who were Black from 69% during the quota years to 17.2%; since Blacks terminate at approximately twice to three times the rate of Whites and Hispanics, the long term savings of training costs to the

defendant is substantial from the use of the 1979 Firefighter Examination.

(2) The Validity of the written test used in 1979 is higher than the written tests utilized in the quota years and is substantially higher than the correlation coefficients obtained for the quota and 1979 interviews, which plaintiffs contend should be weighted 100%.

(3) Similarly, the PAT administered to eligible candidates from the 1979 Firefighter Examination has substantially more validity than the prior versions of the PAT; no overall correlation coefficient was adduced for the prior PATs.

(4) Plaintiffs failed to show the quality of recruits selected by the unspecified alternative procedure equals the quality of recruits selected by the 1979 Firefighter Examination.

(a) Simple comparisons of termination rates or mean scores on criteria do not establish the quality of recruits hired per the testimony of Mr. Frazier and Mr. Ruch.

(b) Even if such comparisons could establish the quality of recruits hired, it is insufficient to establish the efficacy of the selection procedure used to hire them, per the uncontradicted testimony of Mr. Ruch, which established that such equality could be the result of the different quality of the applicant populations.

(c) The opinion of Mr. Ruch that the quota recruits came from a more qualified applicant population due to, e.g., larger percentages being veterans, who are particularly well suited for the paramilitary environment of the Academy, is borne out by the fact that 71% of the recruits hired during that period were veterans as opposed to 58% of the recruits hired from the 1979 Firefighter Examination.

(5) In Mr. Ruch's opinion, again uncontradicted, the unspecified alternative procedure would not be a suitable alternative under the Uniform Testing Guidelines because the selection devices which comprise it, especially the interview, have not been shown to have substantially the same validity as the 1979 Firefighter written test.

20. Plaintiffs have failed to show that the education requirement has as adverse impact on Blacks and Hispanics, whether in terms of actual applicants who were disqualified by the educational requirement or potential applicants who otherwise would have applied for the 1979 Firefighter Examination but for the educational requirement.

a. Mr. Ruch, who is qualified as an expert in labor market analysis and whose qualifications and credibility are well established, testified without contradiction, that the data relied upon by Dr. Kirkpatrick failed to establish the availability and qualification of those who are potential applicants to the job of firefighter in Los Angeles County because they failed to account for, *inter alia*, age, geographical location, the appropriate time period, and whether or not the Hispanics in particular were illegal aliens.

b. No evidence was adduced that the GED alternative produced adverse impact; to the contrary, it is not a substantial obstacle since 7 of 10 who attempt it pass.

c. The ability of the defendant to obtain sufficient numbers of Blacks and Hispanics to meet a hiring rate of 55% during the quota period when the education requirement was in effect, in percentages far in excess of their representation in the CLF, refutes any inference that the education requirement discouraged a significantly larger number of Blacks and Hispanics than Whites.

21. Defendant has shown that the education requirement is job related, is required by State Law for the position of firefighter, and is necessary for the safe and efficient operation of the Fire Department.

a. The level of education required by the emergency medical and rescue functions of Los Angeles County Firefighters, which comprise 69% of responses currently, is at least that of a high school graduate.

(1) The emergency medical technician certification ("EMT-1"), required of all firefighters within one year of appointment, is taught at the first year college level.

(2) Those without, at least high school level education have little chance, on the average, to successfully pass the course required for certification, which is taught in community colleges outside the Academy.

b. The level of education required of firefighter paramedics in the Los Angeles County Fire Department is higher than that required for EMT-1s.

(1) While becoming a firefighter paramedic is not a formal job requirement, more than 86% of all firefighters hired from 1979 to 1981 have become paramedics or participated in the training program; almost 93% of all firefighters hired from August 1979 to 1981 have become paramedics or participated in the training program.

(2) There is a continuing vacancy factor for firefighter paramedics.

(3) The cost of training a firefighter to be a paramedic is substantial (i.e., more than $13,00 per trainee).

(4) The material which paramedics must master and use on a daily basis is material used by doctors with whom they must communicate.

(5) The paramedic must be able to utilize mastery of the material and reference it to act independently of the doctor, if necessary, in critical situations which may result in death or serious injury if the paramedic cannot do so.

22. Plaintiff have failed to show the existence of an alternative selection device to the education requirement which would serve the defendant's legitimate interest in predicting the success of recruits in the Fire Academy and on the job and would have less of a disproportionate impact upon minorities.

23. Plaintiffs have failed to show that the PAT administered to eligible candidates from the 1979 Firefighter Examination had an adverse impact on Hispanics.

a. The analysis of adverse impact of the PAT as administered to all eligible candidates from the 1979 Firefighter Examination conducted by defendant established the absence of adverse impact against Hispanics under the 80% rule of the Uniform Testing Guidelines, in that the pass rate of Hispanics was within 80% of the pass rate of Whites and no sufficient evidence to rebut that determination was adduced by plaintiffs.

b. Such analysis was more accurate and trustworthy than the figures relied upon by Dr. Kirkpatrick as the basis for his opinion that adverse impact against Hispanics resulted from the 1979 PAT, since Dr. Kirkpatrick's figures were based upon only part of the entire population of 1979 PAT participants.

24. Despite the lack of adverse impact, defendant has sufficiently established the validity and utility of the 1979 PAT in predicting the physical performance of recruits in the Academy and on the job to show its job relatedness.

a. The scores of passing recruits on the 1979 PAT was correlated to the criterion of deficiency points in the Academy, which is a measure of physical performance in training and on the job.

b. The correlation coefficients obtained for each part of the 1979 PAT and overall were statistically significant, and the correlation coefficient for the overall PAT was of sufficient magnitude to be useful in the prediction of performance (i.e., a 27% improvement of prediction of the deficiency points assessed to recruits was shown by use of the 1979 PAT).

25. Plaintiffs have failed to show the existence of an alternative selection device to the PAT which would serve the defendant's legitimate interest in predicting the success of recruits in the Fire Academy and would have less of a disproportionate impact upon minorities.

26. Plaintiffs have failed to show any injury real or potential, from the 1979 Firefigter Examination which could be related to any subsequent firefighter examination.

27. The 1979 Firefighter Examination was a neutral, objective, selection procedure administered a single time, discrete parts of which defendant had validated or otherwise determined to be legally sufficient. No issue has been raised as to the 1979 Firefighter Examination as being intentionally discriminatory.

28. Any of the foregoing findings of fact which are more properly conclusions of law are so deemed.

CONCLUSIONS OF LAW

1. Plaintiffs have failed to show liability on the part of defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII").

2. Plaintiffs have failed to meet their burden of establishing a *prima facie* case of adverse impact in terms of the 1979 Firefighter Examination when considered as a single integrated selection procedure.

3. Plaintiffs have failed to meet their burden of establishing a *prima facie* case of disparate impact in terms of the written test as a discrete selection device of the 1979 Firefighter Examination as to Hispanics. Similarly, plaintiffs have failed to establish a *prima facie* case of disparate impact against both Hispanics and Blacks as to the ER and PAT.

4. Defendant has carried its burden of proving the job-relatedness of each of the selection devices in issue and has otherwise shown their use to be a business necessity or otherwise to have a legally sufficient basis.

5. The burden of identifying alternative selection devices which would serve the defendant's needs equally well with less of a disporportionate impact upon Blacks and Hispanics rests on plaintiffs and has not been met for any of the selection devices in question.

6. Plaintiffs have failed to establish their standing to challenge, on liability grounds, any subsequent firefighter examination.

7. As a matter of law, plaintiffs cannot show that any subsequent examination for firefighter is a continuation of a pattern and practice of discrimination against Blacks and Hispanics.

8. Any conclusion of law which is more properly a finding of fact is so deemed.

Dated: May 5, 1983

Malcolm M. Lucas
United States District Judge

No. 85-1364

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

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HERSHEL CLADY, et al.,
Petitioners.

vs.

COUNTY OF LOS ANGELES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, County of Los Angeles, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case reported at 770 F.2d 1421. The reasons advanced by petitioners are not supported by the record and do not warrant the granting

of the discretionary writ.

In the alternative, respondent urges that the writ be granted to reexamine the rationale and applicability of this Court's opinion in Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

STATEMENT OF THE CASE AND BACKGROUND

This is a class action brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq.). Petitioners are certain unsuccessful black and hispanic applicants who, purporting to represent all such former and future applicants, challenged certain aspects of the County's 1979 entry-level firefighter selection procedure under the theory of "disparate impact."[1/]

[1/] The examination in question was open to applicants at least 18 years of age, but

(cont.)

The genesis of the instant case can be found in the history of prior litigation chronicled by this Court in County of Los Angeles v. Davis, 440 U.S. 625, 59 L.Ed.2d 642, 99 S.Ct. 1379 (1979). In Davis, this Court recounted the County's self-generated efforts in the early seventies to increase

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1/ (cont.)

not older than 29. Applicants had to have a high school degree or its equivalent. Applicants were first given a written test. If they scored at least 53 correct out of 95 multiple choice questions, they were passed on to an oral interview. An "eligible list" was then created and applicants were ranked on the list in relative order by weighting the written examination by 25% and the oral interview by 75%. As openings arose, applicants were chosen from the list and administered a physical agility test on a pass/fail basis. If they passed, they were then admitted to the next training class at the Fire Academy.

In the proceedings below, petitioners challenged the education requirement, written examination and the physical agility test. Petitioners' arguments in their petition for certiorari are, however, limited to the written test. Petitioners have apparently conceded the lack of merit to their challenge below to the education requirement and to the physical agility test.

minority representation in its Fire Department. Specifically, in 1971 the County abandoned the use of a 1969 written examination which, in the County's own assessment, proved to have an undesirable effect upon minority hiring efforts, and in its place devised a pass-fail written examination from which successful applicants would then be selected at random for further oral interview and physical agility testing. The pass-fail portion of the examination was given in January of 1972, and resulted in a ninety-seven percent passing rate having no significant impact on minority hopefuls. Before the County could implement the random-selection process, however, it was enjoined from doing so in state court based on allegations that random-selection would violate the County Charter and its civil service merit regulations. (440 U.S. at pp. 626-631.)

Unable to complete the entire examination process and faced with a critical firefighter shortage, the County proposed to interview and hire from the top 544 applicants on the 1972 written examination in order to meet the Fire Department's urgency requirements. The proposal was not intended to eliminate the remaining applicants from later consideration. However, because of objections by minority representatives and the advent of subsequent litigation, the proposal was never implemented. (Id.)

In 1973, the Davis class action was filed, challenging the 1969 written examination and the County's proposal to interview the top 544 applicants on the 1972 written examination. Finding no discriminatory intent, the District Court nonetheless imposed a sweeping quota hiring order, requiring the County to hire one black and one hispanic

for every three whites. The Ninth Circuit later reversed the District Court with respect to the 1969 examination, finding that the named plaintiffs lacked standing, but upheld the District Court's imposition of the quota hiring order based on the County's 1972 urgency hiring proposal. That order remained in effect from 1973 through 1979, the date of this Court's opinion in Davis which held that the controversy concerning the 1972 proposal had, over the passage of time, become moot. This Court, however, expressed its view that it was "extremely doubtful" whether any impermissible discrimination had, in fact, occurred. (440 U.S. at p. 1633.) The four dissenting justices, moreover, while not concurring with the majority's mootness holding, agreed that the quota hiring order was, in any event, unjustifiable. (440 U.S. at pp. 634-647 and fn. 12.)

It is against this background that the arguments advanced by Petitioners must be viewed. In their petition, they selectively quote one sentence taken out-of-context from the majority opinion in Davis, from which and without discussion of the Davis case itself they seek to raise an inference that the firefighter selection procedure implemented by the County in 1979 constitutes an attempt to "revert" to pre-Davis discriminatory practices. [2/] Petitioners' incomplete quotation from Davis,

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[2/] Petitioners quote the statement in the majority opinion, made in conjunction with the Court's mootness analysis, that "[t]here has been no suggestion by any of the parties, nor is there any reason to believe, that petitioners would alter their present hiring practices if the injunction were dissolved." (440 U.S. at p. 632.) Petitioners omit the following sentence in which the Court explained that "[a] fortiori, there is no reason to believe that petitioners would replace their present hiring procedures with procedures that they regarded as unsatisfactory even before the commencement of this litigation." (440 U.S. at pp. 632-633; emphasis added.)

deleting discussion of the facts of the case and parts not favorable to their argument, is at best, seriously misleading, being calculated to divert the Court's attention from an accurate understanding of the historical perspective underpinning the present controversy, and the District Court's findings in the instant case.

The firefighter selection procedure utilized by the County in 1979 is in full accord with both federal and state law, as well as being designed to select the best candidates for the job. If anything, the County is to be lauded for its continuing sensitivity to the process of selection of qualified minorities, efforts which the Ninth Circuit praised and petitioners blindly ignore (770 F.2d at p. 1434), while at the same time being committed to providing and maintaining the finest level of public fire protection services available anywhere.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Record Does Not Support Petitioners' Reliance On Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

Put simply, petitioners' legal arguments attacking the County's validation studies are premised on a selective mischaracterization of the District Court's exhaustive findings.[3/] Armed with that mischaracterization, petitioners lurch to

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[3/] Petitioners, in their attempt to evade those findings, go so far as to engage in needless affrontery by suggesting that Judge Lucas, now an Associate Justice of the California Supreme Court, somehow allowed himself to be duped into signing inappropriate findings proposed by the County. (Petition, p. 11.) There is not so much as a scintilla of evidence in the record in support of this attack on the integrity of the trial judge. To the contrary, the Ninth Circuit properly noted that Judge Lucas was careful to reject those proposed findings "with which he disagreed." (770 F.2d at p. 1427, emphasis added.)

the conclusion that the Ninth Circuit "... rejected this Court's ruling in Albemarle Paper Co. v. Moody, supra, ..." (Petition, p. 12.)

In Albemarle, this Court criticized the employer's validation study because it included only job-experienced, white workers, while excluding new job applicants (including minorities) who actually took the tests in question. (442 U.S. at p. 435.) Distinct from the situation in Albemarle, the County's validation studies included all test takers who passed the written examination and then completed training at the Fire Academy, and compared their actual performance on that examination with their actual performance at the Academy. (Finding No. 16.) The County's studies established a significant positive correlation between comparative success on the written test and important elements of firefighter training. (Id.)

Albemarle requires that minority as well as white applicants be included in validation studies which seek to demonstrate the job relatedness of a selection device. It does not, as petitioners claim, require that separate validation studies be performed for each minority group separately. Indeed, the very suggestion that racial groups need be isolated and tested on a separate basis smacks of racial stereotyping. The issue for validation purposes is not whether one racial group performs better on a given test than another. The question is whether the test is fairly related to the necessary job skills or work characteristics. The District Court specifically found in this regard that the job-relatedness of the 1979 written test "... improves the chances of selecting qualified recruits from 9% to 48% [.]" (Finding No. 17(d)(2)(g).[4/]

[4/] See p. 12.

No validation study will ever satisfy those, like petitioners, intent on finding fault at any cost. The concurring remarks of Justice Blackmun in Albemarle, supra, 422 U.S. at p. 449, are an appropriate rejoiner to petitioners' unrealistic and impractical interpretation of this aspect of Title VII:

> "The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the

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4/ Despite an overrepresentation of minority examinees and aggressive minority recruitment efforts which resulted in an atypical pool, "... the 1979 Firefighter Examination substantially reduced the percentage of [Academy] terminees who were black from 69% during the quota years to 17.2%[.]" Finding No. 19(d)(2)(g).)

job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis. I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII."

2. Petitioners Failed To Identify Any "Less Discriminatory Alternative" To The Written Examination.

The District Court devoted extensive findings to the question whether petitioners were able to demonstrate an alternative selection device to the written portion of the 1979 examination which would have a less disproportionate impact upon minorities and which would still meet the County's legitimate needs. (Finding No. 19.) The District Court found that petitioners failed to identify any selection procedure which would serve as a suitable alternative. (Finding No. 19(a).) Rather, petitioners engage in the simplistic argument that: (1) hiring under the Davis-era quota order from 1973-1978 resulted in more minority hires, and (2) hiring under the County's civil service "banding" rule adopted in April of 1981, as

opposed to the traditional civil service "rule of three," would result in more minority hires. (See, Findings Nos. 9 and 10.)

To argue, as petitioners do, that a quota hiring order is a "less discriminatory alternative" is simply to argue for the absurd. A quota is, itself, an inherently discriminatory device which is to be utilized only for the most exigent remedial purposes. Not only would a self-imposed quota violate Title VII, but the selection process that was in effect from 1973 through 1979 was shown to have lesser validity as a predictor of job success than the 1979 examination, as well as having a greater financial impact on the County.

Petitioners' argument that the County's banding rule is a "less discriminatory alternative" fails, if for no other reason, because petitioners presented no evidence

on the impact of the banding rule on minority hiring after April of 1981. (770 F.2d at p. 1433.) Use of the banding rule prior to April of 1981, moreover, would have required the County to violate its own presumptively valid state charter. Ironically, in arguing for the banding rule petitioners are, in fact, arguing for a rule which provides a public employer far more discretion in hiring than the traditional rule of three. Petitioners are thus complementing, albeit backhandedly, the County's proven commitment to affirmative action once qualified applicants have been identified through the selection process. That ultimate committment, however, is no alternative to the selection process itself.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Connecticut v. Teal, Supra, Was Improvidently Decided And Should Be Reversed Or Limited.

A respondent, without cross-petitioning, is "entitled under our precedents to urge any grounds which would lend support to the judgment below ...." (Dayton Board of Education v. Brinkman, 433 U.S. 406, 419, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).) And while respondents recognize that this Court should not lightly overrule recent precedent, neither should it hesitate to do so when it is apparent that the prior case was wrongly decided. (Garcia v. San Antonio Metropolitan Transit Authority, 496 U.S. ____, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).)

There was never any question in this litigation that the overall 1979 selection process had no adverse effect on minorities. Early in its opinion, the Ninth Circuit observed:

> "The plaintiffs concede that there is no 'bottom line' adverse impact on blacks and Hispanics when evaluating the total selection process. Significantly, the district court found that there was '[n]o statistically significant difference between hires of Blacks and Hispanics and their representation in the Civilian Labor Force....' Finding No. 14(a)(1).
>
> "However, in Connecticut v. Teal, the Supreme Court held that discrete pass/fail barriers having

adverse impact must be individually validated even if there is no 'bottom line' disparate impact for the entire multi-component selection process. 457 U.S. at 442, 452, 102 S.Ct. at 2528, 2533." (770 F.2d at p. 1429.)

The arguments against the rationale underlying Teal, a 5-4 decision, are persuasively articulated by Justice Powell in his dissenting opinion, and will not be repeated here.

Teal, however, was an action brought by individual applicants, and it was on the theory that Title VII protects individuals, rather than the minority group as a whole, that the majority in Teal rested its opinion. Here, to the contrary, petitioners were permitted in the context of a monolithic class action to assert Teal as a challenge

to discrete portions of the overall examination process. (See, Findings Nos. 1 and 13.) Far from having a commonality of interest, the interests of the class were inherently in conflict. For example, the failure of one individual member of a minority group to pass the educational requirement reduced competition and thus necessarily inured to the benefit of other members of that same minority group, who may have stumbled in later portions of the examination process. Respondents submit that rarely, if ever, is a class action appropriate under the rationale of Teal, and urge the court to limit its applicability accordingly.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners submit this reply memorandum to address the following arguments first raised in the brief in opposition filed by Respondent County of Los Angeles ("County"):

I

RESPONDENT HAS MISSTATED THE DIFFERENTIAL VALIDATION REQUIREMENT IN *ALBEMARLE PAPER CO. v. MOODY*

The County has misinterpreted both *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and the Petitioners' position with respect to the second question presented for review.

The County contends that *Albemarle* merely "requires that minorities as well as white be included in validation studies which seek to demonstrate the job relatedness of a selection device." (Respondent's Brief in Opposition, p. 11.) It then contends that it is Petitioners' position that "separate validation studies be performed for each minority group separately" to determine "whether one racial group performs better on a given test than another." (*Id.*)

To the contrary, Petitioners rely on this Court's holding in *Albemarle* that the testing program was not shown to be job related based, in part, on the requirement in the EEOC Guidelines that, where technically feasible, there be " 'separate validation of the test for the minority group in question' 29 CFR § 1607.5(b)(5)" and the recognition that "there has been no clear showing that differential validation was not feasible for lower level jobs." 422 U.S. at 435. The point is that the written test which has an adverse impact on employment opportunities for minorities must, where feasible, be shown to be job related for minorities. Here, the County *did* perform such "differential validation." Petitioners' point is that the uncontested findings in the County's own validation study show that the written test did not predict later job performance for either blacks or Hispanics.

Defendant makes reference to two findings in conjunction with this issue which have no discernible relevance. First, the finding that "the 1979 written test '. . . improves the chances of selecting qualified recruits from 9% to 48%' " (Respondent's Brief, p. 11) is not relevant because it is nothing more than a speculative projection based on the correlations found for all recruits including white recruits. (Df. Ex. 201, p. 44.) Hence, it does not negate the absence of a correlation for minority recruits. Indeed, this speculative finding is meaningless because in reality the

1979 test did not improve the chances of selecting more qualified recruits because the uncontested facts are that 89.8% of recruits graduated from the Academy from 1973 to 1978 and 88.7% in 1979 and 1980.

Second, the reference to the finding that "the 1979 Firefighter Examination substantially reduced the percentage of [Academy] terminees who were black from 69% during the quota years to 17.2%" can be misleading. This fact does not mean that the 1979 written test dramatically reduced the termination rates for black recruits. The uncontested facts are that the graduation rate for blacks during these two periods were almost identical: 74.8% from 1973 to 1978; and 77.8% for 1979 and 1980. (Df. Ex. 200, p. 78; Df. Ex. 201, p. 35.) The figures relied upon by the County result solely from the fact that from 1973 to 1978, a greater percentage of recruits were black and that during both periods, blacks were disproportionately terminated from the Academy. The change in the County's use of the written test simply had no impact on black recruits - a result which would be expected where the test was found not to correlate with later performance.

II

PETITIONERS HAVE RAISED ONLY A SINGLE LESS DISCRIMINATORY ALTERNATIVE IN THE PETITION

Contrary to the County's assertion, Petitioners have not chosen to base its less discriminatory alternative argument in this Court on the alternative of a "banding" approach to ranking candidates. Rather, Petitioners rely solely on the alternative of using the written test with a low passing score in contrast to the 1979 use of the written test to exclude a

greater percentage of all applicant and to rank those applicants who passes the test. As the County recognized in its brief, in 1972 the written test "resulted in a ninety-seven percent passing rate having no significant impact on minority hopefuls." (Respondent's Brief, p. 4; *see also* Petition for Writ of Certiorari, p. 8.) However, in 1979 the passing rates on the written test were much lower: 75.7% for whites; 33.9% for blacks; and 55.6% for Hispanics. (Appendix, p. A-15.) It is this successful alternative method of use of the written test that Petitioners present as the less discriminatory alternative to the County's 1979 practice.

III

THE BOTTOM LINE DEFENSE WAS NOT AN ISSUE IN THIS LITIGATION

Respondent suggests that the writ should be granted in order to reconsider this Court's recent decision in *Connecticut v. Teal*, 457 U.S. 440 (1982). Petitioners submit that the reconsideration of such a recent precedent would be highly unusual. Moreover, in the instant case, the "bottom line" disparate impact issue is not properly presented for review.

There are two reasons the bottom line issue is not properly presented in this case. First, the issue was specifically eliminated as an issue to be litigated when the parties submitted an Amended Pre-Trial Conference Order on July 20, 1982. The original Pre-Trial Conference Order, filed June 21, 1982, had included the bottom line defense as an issue to be tried, but the parties stipulated to eliminating the issue upon learning of this Court opinion in *Teal*. The Local Rules for the United States District Court, Central District of California provide at Rule 9.8.3 that:

> "*Binding Effect.* The Pre-Trial Conference Order when signed by the Court shall control the subsequent course of this action, unless modified at the trial to prevent manifest injustice (Federal Rule Civil Procedure 16)."

See also Rule 16(e),Federal Rule Civil Procedure.

The fact that there are findings relating to the bottom line defense in the Findings of Fact and Conclusions of Law ("Findings") only reflects the liberties taken by counsel for the County in drafting the Findings and the inadequate scrutiny given to these Findings by the District Court. Relying on the Amended Pre-Trial Conference Order, Petitioners did not even raise the bottom line issue in the Court of Appeals. The Court of Appeals misinterpreted the failure to raise the issue on appeal as a concession that there was no bottom line adverse impact. (Appendix, p. A-14.) Petitioners' actions, however, were not a concession but rather a recognition that the bottom line findings were nothing more than facts not relevant to the issues on appeal. Had the bottom line issue remained in the Amended Pre-Trial Conference Order, Petitioners would have addressed the issue on appeal.

The second reason the bottom line defense is not properly presented in this case is that the uncontested facts evidence a severe bottom line disparate impact for minorities. Minorities constituted a full 34% of those who took the written test, the first step in the selection process. In contrast, only 18% of the persons hired were minorities. Hence, the overall selection process caused the employment opportunities for minorities to be cut almost in half.

Petitioners submit, therefore, that the bottom line defense is simply not at issue in this case.

CONCLUSION

For the reasons stated in the Petition and in this Reply Memorandum, it is respectfully submitted that a writ of certiorari should issue as to the questions raised in the Petition but that the writ should indicate that the bottom line issue raised by the Respondent is not subject to review.

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Respectfully submitted,

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